Supreme Court, U.S.
FILED

No. 02-1001 DEC 30 2002

OFFICE OF THE CLERK

In The

Supreme Court of the United States

JOHN P. MESSINA,

Petitioner,

v.

JOHN LABATT LIMITED, a Canadian corporation, and AMERICAN CITRUS PRODUCTS CORPORATION, an Illinois corporation d/b/a HOME JUICE CO.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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164 pp

QUESTIONS PRESENTED

1. Whether Article III, Section 1 of the Constitution imposes a duty on courts of appeals to adjudicate all reasonable, well-grounded claims of judicial misconduct for reversing a district court judgment.

2. Whether a contempt judgment previously affirmed on appeal should be vacated pursuant to Fed. R. Civ. P. 60(b)(6), where counsel in the direct appeal omitted to present reasonable, well-grounded claims of trial court misconduct out of fear that if they presented such claims, the trial court would retaliate against other clients of the firm.

3. Whether the First Amendment bars the use of the federal contempt power to enforce a secrecy order where the district court rendered the order non-appealable by barring the clerk of court from docketing the order or any other record in the case for a period of 56 months.

LIST OF PARTIES TO PROCEEDINGS BELOW

The parties in the court of appeals were (1) the petitioner listed in the caption (who was an attorney for plaintiff Grove Fresh Distributors, Inc. in the district court), and (2) the respondents listed in the caption (defendants in the district court).

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PETITION FOR A WRIT OF CERTIORARI

John P. Messina petitions for a writ of certiorari to review a decision of the United States Court of Appeals for the Seventh Circuit affirming orders of the district court (1) denying a Fed. R. Civ. P. 60(b)(6) motion to vacate a contempt judgment, (2) denying a motion for recusal of the district court, and (3) awarding respondents $7,500 in sanctions.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit (Pet. App. 1a), including the order denying Mr. Messina's petition for rehearing with suggestion of rehearing en banc (Pet. App. 126a), is reported at 299 F.3d 635 (7th Cir. 2002). The orders of the district court in the current appeal (Pet. App. 13a, 34a, 36a) were not published.

A prior order of the court of appeals (Pet. App. 114a) was not designated for publication. It appears on the Westlaw database at 1998 WL 54676 (7th Cir.), *cert. denied*, 527 U.S. 877 (1998). A prior opinion of the district court (Pet. App. 47a) is reported at 888 F. Supp. 1427 (N.D. Ill. 1995). An earlier opinion of the court of appeals involving claims of intervenors is published at 24 F.3d 893 (7th Cir. 1994).

JURISDICTION

The judgment of the court of appeals was entered on August 5, 2002. (Pet. App. 1a.) A timely filed petition for

rehearing was denied on September 30, 2002. (Pet. App. 126a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

U.S. Const. Amend. I

U.S. Const. Article III, Section 1

Fed. R. Civ. P. 60(b)(6)

Fed. R. Civ. P. 79

18 U.S.C. § 2071

28 U.S.C. § 455

Seventh Circuit Operating Procedure 10

Code of Judicial Conduct, Canons 1, 2A

Because of their length, these provisions are set forth in the appendix. (Pet. App. 128a-134a.)

Rule of Professional Conduct 5.6(b) provides: "A lawyer shall not participate in offering or making: . . . (b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties."

STATEMENT

The claim for Rule 60(b)(6) relief rested on two arguments of judicial misconduct. First, Mr. Messina argued

that the district court had violated Canons 1 and 2A of the Code of Judicial Conduct by engineering and enforcing a settlement that, over Mr. Messina's objection, was conditioned on restricting his right to practice law, in violation of R.P.C. 5.6(b). (*Petitioner's Brief in the Seventh Circuit* 13-16, 20-21, 31-32, 45; *Petitioner's Reply Brief in the Seventh Circuit* 23-25.) Second, he argued that the district court had violated Canons 1 and 2A and 18 U.S.C. § 2071(b) (reprinted at Pet. App. 128a) when it interfered with Mr. Messina's right to perfect interlocutory appeals from proceedings growing out of the disputed settlement. (*Petitioner's Brief in the Seventh Circuit* 23-28, 29-31, 38-39, 47-48, 50-52; *Petitioner's Reply Brief in the Seventh Circuit* 1-11.)

Both of these arguments were presented to the Seventh Circuit, but that court failed to adjudicate them. The core issue raised in this petition is whether the Seventh Circuit breached a constitutional duty when it failed to adjudicate these claims. Because the Seventh Circuit's opinion does not describe the facts underlying either of these arguments, a detailed statement of the case is required.

A. Nature of the case.

Attorney John P. Messina represented Grove Fresh Distributors, Inc., a small, closely-held juice company in Chicago, Illinois. Grove Fresh was the plaintiff in two related lawsuits filed 18 months apart in the Northern District of Illinois. In both cases, the complaints alleged that the defendants competed unfairly by making and selling adulterated juices. The defendants in the first case included Everfresh Juice Co., a subsidiary of respondent

John Labatt Ltd. The defendants in the second case included Everfresh, Labatt, and respondent American Citrus Products Corp.

The first case, designated in the district court as no. 89c1113, was filed in 1989 as a public case and went to judgment as a public case in 1992. The second case, designated in the district court as no. 90c5009, was filed under seal in 1990 and was settled under seal in 1993 for $2.25 million. Six months after that settlement, the government released affidavits in a related criminal case in which former officials of Everfresh and American Citrus admitted that throughout the 1970s and 1980s, those companies had knowingly made and sold adulterated juices. (R.449, Ex. C, D, E.)[1]

The complaint in 90c5009 was an expanded version of the complaint in 89c1113. The new allegations in the 90c5009 complaint came from information that Mr. Messina and his client had "obtained from public agencies without help from the defendants or a court order." (R.97p.8.) Nevertheless, over Grove Fresh's objection, the district court sealed 90c5009 without any hearing or explanation, and without any showing that the defendants had met the stringent standards for a prior restraint on the speech expressed in the 90c5009 complaint.

The Northern District of Illinois has an unpublished policy that bars the clerk of court from creating or maintaining a docket for cases filed under seal. (R.541, ¶23.) For 56 months after the commencement of 90c5009 – *i.e.*,

[1] "R._" refers to the district court record in 90c5009.

from August 1990 through May 1995 – the clerk followed this policy in 90c5009. When the clerk finally created a docket in mid-May 1995, there were 380 extant records in the case, but only 248 of those records made it onto the May 1995 docket. The other 132 records were kept by the district court in its chambers and not docketed until two years later, and then only after Mr. Messina had incurred $40,000 in attorney's fees to compel their entry on the docket. (R.541 ¶¶179-84, 204-18.)

In the meanwhile, in November 1993 and October 1994 the defendants moved the district court for rules to show cause why Mr. Messina should not be held in contempt for purported violations of the order sealing the case. The district court held a one-day evidentiary hearing on these motions on February 3, 1995. As of the date of that hearing, the clerk had yet to create a docket for 90c5009.

Prior to the contempt trial, Mr. Messina moved unsuccessfully for the district court's recusal on a proceeding related to the contempt motions. After the contempt hearing but before the ruling thereon, Mr. Messina attempted to appeal the recusal issue, but that appeal was frustrated by the lack of an official record. *See* Section D, below.

In orders issued in June 1995, August 1996, and February 1997, the district court (a) held Mr. Messina in contempt for violations of the seal, (b) enjoined him from speaking about the case without the court's prior permission, upon pain of forfeiting $50,000, (c) enjoined him from representing consumers in a state court class action on the ground that he was not fit to serve as class counsel, and

(d) awarded defendants $150,000 in fees and costs for prosecuting the contempt motions.

All of the acts for which Mr. Messina was held in contempt occurred *before* the clerk created a docket for 90c5009. The Seventh Circuit affirmed the contempt orders on February 5, 1998, in an unpublished order. (Pet. App. 114a.)

Mr. Messina was represented on appeal by Jenner & Block, the same law firm that from 1992 through 1999 represented the defendants-respondents in *Lexicon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998). One month after the Seventh Circuit affirmed the contempt orders against Mr. Messina, this Court reversed the favorable judgment for Jenner & Block's clients in *Lexicon* and sent that case back for a new trial before the Honorable James B. Zagel, the same judge who had issued the contempt orders against Mr. Messina. After this Court decided *Lexicon,* Jenner & Block disclosed that it had truncated its representation of Mr. Messina in order to avoid any conflicts of interest that might lead to its being discharged by other clients with cases on Judge Zagel's calendar, including the clients it represented in *Lexicon*.

Citing Jenner & Block's previously undisclosed conflict of interest, Mr. Messina filed a timely Fed. R. Civ. P. 60(b)(6) motion to vacate the contempt orders. Judge Zagel denied that motion without a hearing. The Seventh Circuit affirmed without adjudicating claims of judicial misconduct at the core of the appeal. This petition followed.

B. The restriction on Mr. Messina's right to practice law.

One of the subjects on which Jenner & Block truncated its representation of Mr. Messina concerned the district court's role in bringing about a settlement that restricted Mr. Messina's right to practice law in apparent violation of R.P.C. 5.6(b). These are the relevant facts:

In 1992-93 settlement discussions, defendants demanded a promise that in the future, Mr. Messina would not represent consumers or anyone else who had claims against them. Mr. Messina refused to bargain over this demand, citing Rule of Professional Conduct 5.6(b), which prohibits settlements conditioned on restricting a lawyer's right to practice. Mr. Messina's unwillingness to bargain over this demand caused a rift with co-counsel. On January 21, 1993, co-counsel threatened to withdraw from the litigation unless Cecil Troy, Grove Fresh's ailing, 77-year-old principal, signed the following letter:

> This confirms our meeting today at Rivkin, Radler & Kremer. You are hereby relieved of all responsibility in the handling of this matter. Warren S. Radler and Dale R. Crider will act as our sole attorneys and trial lawyers.
>
> *We very much appreciate all of your effort in getting this ready for trial* and we are optimistic that the matter will be resolved favorably.
>
> This will also advise you that *you will continue to be entitled to receive 20% of any amount received by way of settlement or verdict.*

(emphasis added) Under Illinois law, Grove Fresh and Mr. Messina could not continue their contingent fee arrangement unless they continued in an attorney-client

relationship after January 21, 1993. *Rhoades v. Norfolk & Western Ry. Co.*, 78 Ill. 2d 217, 227-28, 399 N.E.2d 969, 974 (1979); *In re Estate of Callahan*, 144 Ill. 2d 32, 578 N.E.2d 985 (1991).

Mr. Troy signed the letter. (R.520 ¶40; R.408 Ex.C.) Mr. Messina continued his appearance for Grove Fresh in the district court. (R.453 Ex.A-2¶31.) From January 21, 1993, through the date of settlement three months later, Mr. Messina communicated regularly with Grove Fresh and co-counsel regarding the litigation. The district court later ruled that these communications were protected by the attorney-client privilege. (R.435, Ex.D; A.42b.)

A week after Mr. Messina was "relieved of all responsibility," the district court judge convened a settlement conference to which he invited defense counsel and Mr. Messina's co-counsel, but not Mr. Messina. In Mr. Messina's absence, the judge mediated a settlement whereby the defendants would pay Grove Fresh $2,000,000, but only if Mr. Messina executed a Legal Services and Consulting Agreement with the defendants. The Consulting Agreement would obligate defendants to pay Mr. Messina $250,000 in five $50,000 installments.

The defendants openly acknowledged that they had no intention of using Mr. Messina's services. They only wanted to create the appearance of an attorney-client relationship with him so that the conflict-of-interest rules would prevent him from representing consumers. Mr. Messina refused to sign the Consulting Agreement. The trial judge ordered him to chambers and told him he'd be subject to a $2,000,000 malpractice claim if Grove Fresh lost the settlement because of his refusal to sign the

Consulting Agreement. Mr. Messina signed that same day. (R.453, Ex. A-1, ¶¶24-26.)

The settlement closed in April 1993. At closing, Grove Fresh paid Mr. Messina a $400,000 contingent fee and the defendants paid him the initial $50,000 consulting fee. Mr. Messina escrowed the $50,000 consulting fee while he sought legal advice on whether he had a right to rescind the Consulting Agreement.

C. The post-settlement disputes.

The second subject on which Jenner & Block truncated its representation of Mr. Messina concerned the district court's role in obstructing Mr. Messina's attempts to appeal a ruling denying recusal. The relevant facts are set out in this Section and in Section D, below.

After the settlement closed, two sets of intervenors pressed forward with appeals seeking access to the 90c5009 court file – the Ad Hoc Coalition of In Depth Journalists (Coalition), and consumers who were the named plaintiffs in a state court class action against the defendants. Defendants opposed the appeals, asserting that the seal was justified because the 90c5009 complaint, which Mr. Messina had drafted and signed under penalty of Rule 11, had falsely accused them so as to "extract" an unjust settlement. After learning about defendants' contentions, Mr. Messina gave notice that he was rescinding the Consulting Agreement. He tendered back the initial $50,000 consulting fee and demanded a retraction of their contention that he had falsely accused them in order to "extract" money.

Defendants rejected the rescission, refused to retract, and moved the district court for an order specifically enforcing the Consulting Agreement. (Pet. App. 135a.) The court entered and continued that motion without a date. Mr. Messina then filed a motion in the Seventh Circuit asking that court for a hearing before it published any ruling on defendants' contentions against him. His papers, like defendants' brief, were filed in the court of appeals' public files. His papers identified information rebutting the claim that he had falsely accused the defendants, but the Seventh Circuit denied his motion for a hearing.

On October 31, 1993, the *New York Times*, which for several months had been investigating juice adulteration cases in Michigan, California, and Texas, published a story about those other cases and also about the Grove Fresh litigation. The story included information from Mr. Messina's Seventh Circuit papers. After the *New York Times* story appeared, defendants filed the contempt motions described above in Section A. They also filed a Fed. R. Civ. P. 60(b) motion to rescind the settlement with Grove Fresh. The Rule 60(b) motion alleged that Mr. Messina's Seventh Circuit papers had breached secrecy covenants in the settlement contract and in the Consulting Agreement. The relief sought by the Rule 60(b) motion included a request for an order requiring Mr. Messina to pay over to the defendants the $400,000 contingent fee Grove Fresh had paid him at closing.

D. The interlocutory appeals on intervention and recusal.

Defendants' initial post-settlement pleading, filed in August 1993, treated Mr. Messina as a party to the Rule

60(b) proceeding. (Pet. App. 135a.) Fifteen months later, defendants alleged he was *not* a party to that proceeding, even though they were still seeking to compel him to disgorge the $400,000 contingent fee that Grove Fresh had paid him at the closing of the settlement. The district court ruled for the defendants and barred Mr. Messina from taking any discovery or attending any conferences in chambers.

On February 1, 1995, Mr. Messina moved to intervene in the Rule 60(b) proceeding and to file a motion to dismiss that proceeding and the contempt proceeding. He also moved to recuse the district court, citing the court's role in mediating the settlement underlying both of the post-settlement disputes. The court denied both motions.

On March 2, 1995, Mr. Messina filed a notice of appeal from the orders denying intervention and recusal, but the appeal stalled because there was still no official record of the case – now nearly five years old. The clerk could not create a record because all of the 380 extant case records were in the judge's chambers. The judge refused to release any of those records to the clerk until May 15, 1995, and then released only 248 of them, keeping the other 132 records in his chambers for two more years. The records that the judge refused to release included all of the records that had been created since the commencement of the post-settlement proceedings in August 1993. (R.541 ¶¶179-84, 204-18.)

During the delay caused by the irregularities in the record, the defendants settled with Grove Fresh and then moved to dismiss Mr. Messina's interlocutory appeal as moot. Believing that defendants' settlement with Grove Fresh did not moot his claim for recusal or his disputes

with the defendants, Mr. Messina opposed the motion, but he had no record on which to base his opposition.

On June 9, 1995, the Seventh Circuit granted the motion to dismiss Mr. Messina's interlocutory appeal. As of the date of dismissal, there was still no record of the post-settlement proceedings that were the subject of the interlocutory appeal.

E. The contempt order and the first appeal.

The district court issued its contempt order on June 9, 1995, the same day that the Seventh Circuit dismissed the interlocutory appeal. The Illinois Attorney Registration and Disciplinary Commission (ARDC) learned about the contempt order and opened a disciplinary proceeding into the underlying events. Mr. Messina retained Jenner & Block to represent him on appeal and at the ARDC. At Jenner & Block's urging, the ARDC suspended its proceeding pending the outcome of the appeal to the Seventh Circuit.

Jenner & Block's briefs on appeal did not present any arguments on judicial misconduct. On February 5, 1998, the Seventh Circuit affirmed the contempt order without oral argument. The panel issued a five-page unpublished order that cited only five cases. (Pet. App. 114a.)

The following month this Court ruled against Jenner & Block's clients in *Lexicon*. Shortly after that, the ARDC reopened the disciplinary proceeding against Mr. Messina. Jenner & Block told Mr. Messina that the firm would withdraw from that proceeding unless he waived all defenses predicated on claims of judicial misconduct. According to Jenner & Block, it needed the waiver to

resolve a previously undisclosed conflict of interest between its representation of Mr. Messina and its representation of other clients with cases on Judge Zagel's calendar, including the *Lexicon* defendants. Jenner & Block believed that if it were to present judicial misconduct defenses in the ARDC proceeding, it would have to disclose that fact to its other clients with cases on Judge Zagel's calendar. All or most of those other clients, Jenner & Block believed, would sooner end their relationship with the firm than risk Judge Zagel's retaliating against them for positions taken by Jenner & Block on behalf of Mr. Messina. Because the firm was unwilling to risk the loss of those other clients, the firm had made a policy decision not to raise any judicial misconduct defenses at the ARDC. (R.522, Ex. A ¶¶37-42.)

Mr. Messina declined to limit his defenses at the ARDC, so Jenner & Block withdrew. Representing himself *pro se*, Mr. Messina presented the judicial misconduct defenses. In December 1998, the ARDC accepted those defenses and terminated the proceeding in his favor.

F. Mr. Messina's Rule 60(b) motion.

In June 2000 Mr. Messina filed a timely motion to vacate the contempt order pursuant to Fed. R. Civ. P. 60(b)(6), contending that: (a) Jenner & Block's undisclosed conflict of interest had caused it to omit from the prior appeal non-frivolous grounds for reversal predicated on claims of judicial misconduct; (b) Jenner & Block had a duty to report those grounds to the court of appeals pursuant to R.P.C. 8.3(b); (c) the omitted grounds were outcome-determinative; and (d) the circumstances of the case satisfied the three-part test for vacatur established in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988). The

district court denied the motion without a hearing and without stating any reasons. (Pet. App. 34a, 36a, 38a-42a.)

On August 5, 2002, the Seventh Circuit affirmed. The opinion did not address either of the claims of judicial misconduct at the core of the appeal, *i.e.*, that the district court had improperly engineered and enforced a settlement conditioned on restricting Mr. Messina's right to practice law, and that the district court had wrongfully interfered with the record for the interlocutory appeal that Mr. Messina had filed in the spring of 1995. The court did, however, mistakenly attribute to Mr. Messina an argument that he did *not* make – that "he was not provided a complete record for his [direct] appeal." (Pet. App. 9a-10a.) The court sanctioned Mr. Messina $1,500 on the ground that the argument was frivolous. (Pet. App. 11a-12a.)

On September 30, 2002, the Seventh Circuit denied a request for en banc rehearing. (Pet. App. 126a.)

REASONS FOR GRANTING THE PETITION

The Court should grant this petition for the following reasons:

First: The bar's fear of retaliation for reporting meritorious complaints of judicial misconduct is an old problem. *See Report of the National Commission on Judicial Discipline and Removal* 100 (1993) ["*Report*"] (documenting "a widespread reluctance among members of the bar" to complain about judicial misconduct "because of fear of adverse consequences to themselves or to their clients once their identities are known." *See also Hearings of the National Commission on Judicial Discipline and*

Removal 690, 700, 745 (1993) for supporting testimony. The Commission concluded that the only way to diminish the bar's fear of retaliation "is through the birth and nourishment of a culture in which the bar stands together with other informed citizens both in defending the judiciary against unjustified attacks and in defending lawyers against retaliation by vindictive judges." *Report* at 101.

The proceedings below arose several years after the Commission issued its *Report*. The course of those proceedings shows that the federal bar and bench have yet to develop the culture necessary to deal constructively with meritorious complaints of judicial misconduct. This Court should grant this petition to lead the way to the development of that culture.

Second: Judge Posner has argued (correctly, we submit) that appellate courts have an institutional duty to adjudicate all reasonable arguments for reversing a district court judgment. R. Posner, THE FEDERAL COURTS: CHALLENGE AND REFORM 351-52 (1996) (a signed opinion should only omit issues that have "no possible merit or no general interest"). This duty is especially important when the grounds for reversal include complaints of judicial misconduct. If the complaint is unjustified, the trial judge deserves a public exoneration. If the complaint is justified, the injured parties deserve a public airing of their grievances, and the taxpayers who fund the judiciary are entitled to know about the deficit in the judge's performance.

The Seventh Circuit's failure to adjudicate the arguments of judicial misconduct is unfair to all concerned. The Court should grant this Petition to redress that unfairness

and to instruct the courts of appeals on how they should address comparable claims in the future.

Third: At least one court of appeals has held that substantial violations of the Code of Judicial Conduct should be remedied by vacatur of all acts occurring after the violation. *United States v. Microsoft Corp.*, 253 U.S. 34, 116 (D.C. Cir. 2001). The Court should grant this petition to address authoritatively the range of remedies available for non-frivolous claims of judicial misconduct.

Fourth: In *Walker v. City of Birmingham*, 388 U.S. 307 (1967), this Court held that the collateral bar rule applies to unconstitutional prior restraints, and that such constraints must be obeyed until vacated or modified on appeal. In *dicta*, the Court suggested an exception to the collateral bar rule for cases where the government has delayed or frustrated the right to a timely appeal from a prior restraint, 388 U.S. at 318, but the Court has never ruled on that question definitively. Because this case presents a rich record from which to address this issue, this Court should grant the petition.

Fifth: In *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001), this Court held that a lawyer's right to present all reasonable arguments necessary for the resolution of his client's case or controversy is protected by the First Amendment, and that any regime that chills that right is an unconsitutional impairment of the judicial function created by Article III. In *Legal Services Corp.*, the chill came from another branch of government. Here, the chill on Jenner & Block's advocacy came from within the judiciary itself. The Court should grant the petition to address how to remove the judicial chill on lawyers whose clients have well-grounded claims of judicial misconduct.

Sixth: The Seventh Circuit erred by failing to address the line of cases beginning with *Bankers Trust Co. v. Mallis*, 435 U.S. 357, 384 n.4 (1978), which hold that orders are neither enforceable nor appealable until they are docketed. *Matter of American Precision Vibrator Co.*, 863 F.2d 428, 429 (5th Cir. 1989) (holding that undocketed orders "cannot be appealed [and] cannot be enforced."); *Stelpflug v. Federal Land Bank of St. Paul*, 790 F.2d 47, 49 (7th Cir. 1986) (same). This rule invalidates the contempt order because the underlying acts occurred in 1993 and 1994, but the 90c5009 secrecy orders were not docketed until 1995 and 1997. (R.388, 107.)

CONCLUSION

The petition for writ of certiorari should be granted and the case should be set for briefing and argument.

Respectfully submitted,

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In the

United States Court of Appeals
for the Seventh Circuit.

Nos. 01-2799 & 01-3024

GROVE FRESH DISTRIBUTORS, INC.,

Plaintiff,

v.

JOHN LABATT, LTD. and
AMERICAN CITRUS PRODUCTS CORP.,

Defendants-Appellees.

APPEAL OF: JOHN P. MESSINA.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 90 C 5009 – **James B. Zagel**, *Judge.*

ARGUED MAY 21, 2002 – DECIDED AUGUST 5, 2002

Before: BAUER, COFFEY and RIPPLE, *Circuit Judges.*

BAUER, *Circuit Judge.* The district court issued a civil contempt order against attorney John P. Messina after he disclosed confidential information in publicly filed documents in violation of a protective order. After an unsuccessful direct appeal and a second contempt order, Messina filed two subsequent motions in the district court for reconsideration of the first contempt order: one motion claimed that the record in his direct appeal was incomplete, and the other sought Judge Zagel's recusal based on

an "unremitting bias." The district court denied both motions. Messina appeals the district court's decisions on numerous grounds. For the following reasons, we affirm the decisions of the district court. Moreover, because we find Messina's appeal frivolous, we impose Rule 38 sanctions and order him to pay costs, plus $1,500 to appellee American Citrus.

BACKGROUND

Attorney John Messina represented Grove Fresh Distributors Inc. ("Grove Fresh") in two separate but related suits filed against competing orange juice manufacturers for violations of various federal laws. Appellees were among the five defendants named in the two suits. The 1989 complaint alleged unfair competition and was insulated by a protective order. The 1990 suit alleged a conspiracy to sell adulterated orange juice and to violate RICO by selling mislabeled products and this was under a seal and protective order. Over the course of the early stages of the litigation, Messina repeatedly disregarded the protective orders and disclosed protected information in public filings with the court.

The district court eventually entered summary judgment on the 1989 unfair competition complaint, while the 1990 case proceeded with settlement negotiations. On April 25, 1993, the parties orally agreed to terms of a settlement but the defendants would not definitively agree to settle until Messina agreed to the confidentiality provisions in a consulting agreement. Thereafter, the court dismissed the 1990 case, but substantial problems arose regarding the settlement agreement and with the dismissal.

On August 24, 1993, the defendants filed a motion to enforce the settlement agreement or for relief from judgment pursuant to Rule 60(b) as a result of Messina's conduct after the dismissal. When the parties were to appear before Judge Zagel, Messina was not present. Judge Zagel ordered him to appear at the next court proceeding, but again, Messina was not present. The district court then issued a rule to show cause.

On January 21, 1993 Grove Fresh discharged Messina as its attorney in this litigation, but failed to withdraw the record of appearance for Messina until April 12, 1995. In October of 1993, Messina filed a 42 page motion in this Court seeking a hearing on allegations of misconduct. The motion revealed information subject to the seal and protective orders, including the confidential amount paid in settlement, names of the individuals involved who invoked the Fifth Amendment, and other confidential information acquired through discovery. Messina also represented that he was still counsel for Grove Fresh, despite the fact that Grove Fresh had discharged him nine months earlier.

On November 9, 1993, we dismissed Messina's pleadings and ordered that he show cause as to why he should not be sanctioned for filing a frivolous motion. We also referred his conduct to the Illinois Attorney Registration and Disciplinary Commission.

In response to Messina's conduct during the course of the litigation, the appellees petitioned the district court, requesting a finding of contempt and imposition of sanctions. Alleging that Messina had violated the protective order and seal, appellees charged that: (1) Messina was in contempt of court for repeatedly violating the seal and

protective order for the 1990 case by his disclosures of confidential discovery material in a brief filed with the Court of Appeals, in a letter to counsel for an intervening party and in a conversation with a *New York Times* reporter; (2) Messina was in contempt of court for failing to appear before Judge Zagel when ordered to do so; and (3) Messina was subject to Rule 11 sanctions for making false or misleading representations to the Court of Appeals regarding his status as a Grove Fresh attorney. Judge Zagel held an evidentiary hearing on the matter on February 3, 1995, to provide Messina an opportunity to respond to the charges.

After the hearing, Messina again filed a series of pleadings in this Court and again included the amount paid in settlement. On June 9, 1995, we dismissed Messina's appeal as moot and stated, "if Messina continues to file frivolous papers, this court will impose sanctions."

On June 9, 1995, the district court issued an opinion finding that Messina intentionally, willfully and repeatedly violated the confidential seal and protective order based on the disclosures in the 42 page motion filed in this Court, in his conversations with the *New York Times* reporter and in his letter to the intervening party. *Grove Fresh Distributors, Inc. v. John Labatt, Ltd.*, 888 F.Supp. 1427 (N.D. Ill. 1995). The court characterized Messina's actions as "audacious, even by his [Messina's] own standards of audacity." The court also found that Messina intentionally and willfully disobeyed an order to appear before the district court on October 21, 1993, and that he violated Rule 11 in the motion he filed in this Court by misrepresenting himself as counsel for Grove Fresh. As a deterrent to future improper disclosures, the court ordered

Messina to post a $50,000 bond and warned that failure to comply with the order would result in forfeiture of the bond and possible additional sanctions.

The contempt order also specifically prohibited Messina from disclosing any protected information in the case without first consulting the court and establishing an independent public source for the information. Finally, Messina was ordered to pay attorneys' fees and expenses incurred by the defendants in prosecuting the contempt petitions, and a $1,000 fine for his Rule 11 violations. A judgment was entered against Messina in the amount of $149,554.45, plus statutory interest. Messina appealed the district court's order; we unanimously affirmed the contempt judgment in an unpublished opinion dated February 6, 1998. 134 F.3d 374 (7th Cir. 1998).

Even after this order was entered, Messina continued to disregard court orders and to include documents designated as confidential in public filings. In September of 1999, Messina filed for Chapter 11 reorganization in the name of his law firm. The appellees (judgment holders) filed an adversary action for a declaration that the contempt judgment was not dischargeable because it was based on willful and malicious conduct. In response, Messina filed an affidavit with the United States Bankruptcy Court that included information under protective order. Messina filed the affidavit publicly and did not seek the district court's prior authorization for this disclosure.

On May 16, 2000, the defendants filed a petition in the district court, seeking a determination that Messina again be held in contempt for his disclosures in the bankruptcy proceeding. The district court granted this petition,

and a second contempt decision was rendered on June 8, 2000.

In June of 2000, Messina filed a motion to vacate the original contempt judgment, alleging that the manner in which the record for the first appeal was kept and assembled was improper. Messina claimed that the attorneys who represented him failed to raise this issue in his direct appeal because they feared judicial retribution from the district court in other litigation. In addition, Messina moved to recuse Judge Zagel, asserting an "unremitting bias" and conduct that Messina contends could result in Judge Zagel's impeachment. The district court denied both motions and subsequent motions to reconsider. Messina then filed this appeal.

ANALYSIS

A. Motion For Recusal and Vacatur of Contempt Order

Messina first argues that the district court erred in failing to grant his motion for recusal pursuant to 28 U.S.C. § 455(b)(1). We review *de novo. Taylor v. O'Grady*, 888 F.2d 1189, 1201 (7th Cir. 1989).

A federal judge must recuse himself from a proceeding "where he has a personal bias or prejudice concerning a party." 28 U.S.C. § 455(b)(1). Any bias must be proven by compelling evidence, and the issue is whether "a reasonable person would be convinced the judge was biased." *Lac du Flambeau Indians v. Stop Treaty Abuse-Wis., Inc.*, 991 F.2d 1249, 1255 (7th Cir. 1993) (citations omitted). The bias or prejudice "must be grounded in some personal animus or malice that the judge harbors . . . of a kind that a fair-minded person could not entirely set aside when judging certain persons or causes." *United States v. Balistrieri*, 779

F.2d 1191, 1201 (7th Cir. 1985). "Judicial rulings alone almost never constitute a valid basis" for a recusal motion. *Liteky v. United States,* 510 U.S. 540, 555 (1994). Even "judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to counsel, the parties or their cases, ordinarily do not support a bias or partiality challenge," unless the remarks "reveal an opinion that derives from an extrajudicial source." *Id.* The evidence must reflect a "deep-seated favoritism or antagonism as would make fair judgment impossible." *Id.* Likewise, "a judge's ordinary efforts at courtroom administration – even a stern and short tempered judge's ordinary efforts at courtroom administration – remain immune." *Id.* at 556.

We agree with the district court that Messina has failed to establish any basis for recusal. Messina asserts that Judge Zagel's decisions against him repeatedly demonstrate an "unremitting bias." However, Messina makes no attempt to establish any bias stemming from a personal relationship or prior litigation. Instead, he dwells on Judge Zagel's rulings during the litigation, which absent extraordinary circumstances, are not grounds for recusal. *Id.* at 555. Although Judge Zagel criticized Messina's conduct several times throughout the litigation, these incidents were in direct response to Messina's repeated disregard for the confidentiality orders. His efforts at courtroom administration and enforcing compliance with a court order do not amount to an inability to render fair judgments.

Messina also argues, at length, that the district court showed bias by permitting the appellees to advance contrary positions concerning his status as a Grove Fresh attorney in the litigation. However, the record reflects that

Grove Fresh failed to withdraw Messina's appearance immediately upon discharging him. As a result, the appellees were confused as to his status as counsel for Grove Fresh. Their contradictory contentions on the matter only reflected the inconsistent positions advanced by Grove Fresh and Messina, and certainly not any bias by Judge Zagel.

Messina also asserts that the court improperly issued the contempt judgment because of his misrepresentations as counsel for Grove Fresh. He challenges this ruling, asserting that it is barred by the doctrine of collateral estoppel because it contradicts an earlier ruling in which the court sustained the invocation of the attorney-client privilege by Grove Fresh regarding its communications with Messina. Again, Messina's assertions are misplaced. First, the court's determination that Messina misrepresented himself as a Grove Fresh attorney was not at issue in the court's contempt ruling; rather, it was one of three bases supporting Rule 11 sanctions. Further, the doctrine of collateral estoppel is not involved; the two rulings are entirely unrelated. Messina's misrepresentations were the focus of the Rule 11 finding, whereas the attorney-client ruling focused on whether certain documents contained any privileged communications between Grove Fresh and Messina. Grove Fresh was and is entitled to maintain the confidentiality of its communications with Messina, regardless of his discharge. Messina's argument that collateral estoppel requires that the contempt order be vacated is entirely without merit.

Messina's other allegations regarding the manner in which Judge Zagel conducted the litigation are equally without merit. First, the evidence supporting Judge Zagel's rulings was overwhelming: Messina repeatedly

violated the confidential protective orders of the court, the evidence supporting these determinations is specified in the contempt decision, and the court found each violation to be established beyond reasonable doubt. Second, judicial rulings are grounds for appeal, not recusal. *Liteky,* 510 U.S. at 555; *Hook v. McDade,* 89 F.3d 350, 355 (7th Cir. 1996). Here, Messina is simply recycling issues he unsuccessfully raised on direct appeal and now claims that Judge Zagel's actions were unfair. However, we previously upheld the district court's decisions as sound and reasonable on direct appeal. Absent compelling evidence of a personal and extrajudicial prejudice against Messina, Judge Zagel's conduct did not warrant recusal.

Messina also claims that his appellate counsel had a duty to report judicial misconduct based on Judge Zagel's failure to recuse himself. According to Messina, his counsel did not argue his recusal claim on appeal because of a fear of judicial retribution, which amounts to an undisclosed conflict of interest that requires us to vacate the contempt order. As we held above, Messina failed to establish any basis for recusal in the first place. Any argument that his counsel breached a duty in not reporting judicial misconduct based on any failure to recuse is obviously without merit.

B. Maintenance of the Record

Messina next argues that there were irregularities in the assembly of the record for his direct appeal. In fact, he asserts that he was not provided a complete record for his appeal and that the manner in which the pleadings were handled could potentially subject Judge Zagel to impeachment proceedings. However, an affidavit submitted

by his appellate counsel concerning preparation of the record on appeal defeats Messina's argument. In paragraph 23 of this affidavit, Messina's appellate counsel states:

> Through meetings with Ted Newman (the Clerk's officer ombudsman), Mr. Walker, and Wanda Barnes (the court reporter assigned to Judge Zagel's courtroom), I was able to ensure that the record was fully reconstructed and that the record on appeal was complete.

Messina does not point to any missing document or pleading, or any argument that he was unable to pursue because of a deficiency in the record. He does not advance any reason why the maintenance of the docket affected the outcome of his direct appeal. We are satisfied that when we considered Messina's initial appeal and affirmed the contempt judgment, we did so on a complete record.

C. Contempt Sanctions

Messina's final argument is that the court erred in imposing the second contempt order and the $7,500 sanction for filing papers in bankruptcy court that referred to a witness involved in the Grove Fresh litigation who invoked his Fifth Amendment privilege. We review the district court's imposition of civil contempt sanctions for an abuse of discretion. *Fries v. Helsper,* 146 F.3d 452, 458 (7th Cir. 1998).

To hold Messina in civil contempt, the district court "must be able to point to a decree from the court which sets forth in specific detail an unequivocal command which the party in contempt violated." *Jones v. Lincoln Elec. Co.,* 188 F.3d 709, 738 (7th Cir. 1999). Here, the court's orders

precluded specific disclosures and Messina's public filings failed to comply. Messina counters that the court itself disclosed the subject information in its contempt order. As a result, he claims he cannot be sanctioned for disclosing information already in the public domain. However, as the district court explained, "a simple comparison of the documents shows that Messina's affidavit contains information that exceeds that scope of what was included in the published opinion." Accordingly, it was well within the court's discretion to issue the second contempt order and impose the $7,500 sanction.

D. Rule 38 Sanctions

Finally, American Citrus moves, pursuant to Rule 38 of the Federal Rules of Appellate Procedure, for sanctions against Messina. Rule 38 provides that an appellate court may award sanctions against an appellant who brings a frivolous appeal. FED. R. APP. P. 38; *Jansen v. Aaron Process Equip. Co.*, 207 F.3d 1001, 1005 (7th Cir. 2000). An appeal is frivolous "when the result is obvious or when the appellant's argument is wholly without merit." *Spiegel v. Cont'l Illinois Nat'l Bank,* 790 F.2d 638, 650 (7th Cir. 1986). "Pursuing a frivolous appeal invites sanctions, including just damages, which we may impose in our considered discretion." *Berwick Grain Co. v. Illinois Dept. of Agric.*, 217 F.3d 502, 505 (7th Cir. 2000) (internal citations omitted).

We conclude that Rule 38 sanctions are appropriate in this case. We agree with the appellees that this appeal is simply Messina's attempt to repackage his prior appeals. Given that Messina's claims have been unsuccessfully litigated numerous times in both this Court and in the

district court, Messina could not have believed in good faith that he might be successful this time around. *See, e.g., Berwick,* 217 F.3d at 506 (imposing Rule 38 sanctions when appellant could not have reasonably believed that his appeal was filed in good faith based on its complete lack of substantive merit). In his previous appeal, we warned that any future abuse of the legal system would result in sanctions. Messina failed to heed this warning. Because we have previously affirmed Judge Zagel's rulings against Messina, his latest attempt to manipulate the legal system can only be characterized as frivolous. We order Messina to pay costs, plus $1,500 to American Citrus for his abuse of the litigation process and the frivolous nature of this appeal.

CONCLUSION

For the foregoing reasons, we AFFIRM the decision of the district court, and we sanction John P. Messina to pay costs, plus $1,500 to appellee American Citrus.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GROVE FRESH DISTRIBUTORS, INC.,

Plaintiff,

v.

JOHN LABATT, LTD., and AMERICAN CITRUS PRODUCTS CORP.,

Defendants.

No. 90 C 5009
Judge James B. Zagel

ENTERED UNDER SEAL

MEMORANDUM OPINION AND ORDER

Before me is a petition that I had hoped not to see. Defendants, John Labatt Ltd. and American Citrus Products Corp., filed a petition for the issuance of a rule to show cause why John P. Messina, plaintiff Grove Fresh Distributors' former attorney, should not be held in contempt of court. Defendants charge that by including confidential information in court papers publicly filed recently in the U.S. Bankruptcy Court of the Northern District of Illinois and in the Supreme Court of Illinois, Mr. Messina violated protective and contempt orders in effect in this case. There is a stipulated protective order that restricts use of documents designated as confidential to use only in the preparation and trial of this suit, and a sealing order that protects the contents of all documents filed with the court. Also in place is a contempt order, which I entered on June 9, 1995, which specifically prohibits Mr. Messina from disclosing any protected information in this case without first consulting me and establishing an independent public source for the information. *See Grove Fresh Distributors v. John Labatt, Ltd., et al.*, 888 F.

Supp. 1427, 1452 (N.D. Ill. 1995), *aff'd* 134 F.3d 374, *cert. denied* 119 S. Ct. 180 (1998). As a deterrent to future improper disclosures, I ordered Mr. Messina to post a $50,000 bond for the duration of the period and warned that failure to comply with my order would lead to its forfeiture, as well as to possible additional sanctions. *See id.* Familiarity with all prior opinions in this long running case is assumed.

Only a month before the expiration of the five-year period, Mr. Messina has filed two court documents, both of which raise serious questions about his compliance with the 1995 contempt order, and his violation of the protective orders. The first document is an affidavit signed by him and filed publicly in an adversary proceeding brought by John Labatt and American Citrus Products in response to Mr. Messina's chapter 11 petition for bankruptcy on February 8, 2000.[1] *See* Case No. 99 B 29371, Adversary Proceeding No. 99 A 1573. The affidavit contains the following statements:

> 11. As of July 1992, seven defense witnesses had refused to provide discovery by invoking

[1] Defendants contend that two other documents filed in the Bankruptcy Court violate existing orders: a memorandum in support of Mr. Messina's motion for summary judgment and a statement of uncontested facts. Information similar to that contained in the affidavit appears in both. As these documents were signed by Mr. Messina's counsel, they are not properly the basis of a finding of contempt against Mr. Messina. Moreover, upon learning of the defendants' objections to their content, Mr. Cohen moved to have them redacted and placed under seal.

> their Fifth Amendment privilege against self-incrimination, either at depositions or through their attorneys.
>
> 12. In September 1992, American Citrus' president became the eighth witness to invoke the Fifth Amendment, doing so in a letter from his lawyer. To avoid the discomfit of having to invoke the privilege in person at a deposition, American Citrus' president, along with his co-defendants, offered to enter into settlement negotiations in exchange for Grove Fresh's agreement to suspend discovery.

It is undisputed that this information is subject to the protective and sealing orders, as it arose out of the discovery in this case. I found at the time the 1995 contempt order was entered that the information was not independently available from a public source. *See* 888 F. Supp. at 1442. It is also undisputed that Mr. Messina did not seek my permission to publish it.

The second document is a Petition for Appeal as a Matter of Right or, in the alternative, for Leave to Appeal, that Mr. Messina publicly filed in the Illinois Supreme Court on May 19, 2000, on behalf of a group of intervenors in a class action suit arising out of conduct related to the present suit. *See* Case Nos. 93 CH 1610; 93 CH 1753; 93 CH 1754 (consolidated). Defendants contend that the document discloses confidential information that is not drawn from public sources, although they do not identify specific passages.[2] From my own review of the document, I

[2] Mr. Messina argues that the defendants have abandoned their second claim by failing to specify the disputed passages when his

(Continued on following page)

garner that the defendants are concerned with the following statement, that: "several current and former executives of the *Labatt* defendants have invoked the Fifth Amendment privilege against self-incrimination." *See* PLA, at 11. Again, Mr. Messina did not seek my prior permission to disclose publicly this information, which clearly is subject to the protective order.

Mr. Messina filed a written response to the defendants' petition. His first defense is that the disputed information is no longer confidential, as I placed it in the public domain by publishing my June 5, 1995 order in an unredacted format in the Federal Supplement. Setting aside the merits of that argument, which I do not decide,[3] it simply is not a defense to petitioners' charges that Mr. Messina violated my 1995 contempt order. That order provides for Mr. Messina's disclosure of information obtained through an independent public source, but only after compliance with specific procedures which he did not meet. Nor is it a defense to the publication of any information not contained in the published opinion. A simple comparison of the documents shows that Mr. Messina's affidavit contains information that exceeds the scope of

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counsel asked that they do so. I share some of Mr. Messina's frustration; persons who bring motions for contempt should be as specific as possible in their allegations. The defendants attached the petition for leave to appeal to their motion, however, and by doing so avoid a finding of abandonment.

[3] I find it highly doubtful that my contempt order serves as an independent public source of the otherwise confidential information for Mr. Messina, when the opinion would not have been written but for Mr. Messina's own prior impermissible disclosures. Nonetheless, as I need not rule definitively on the question, I do not.

what was included in the published opinion. Paragraph 11 of the bankruptcy affidavit identifies the number of persons who invoked their Fifth Amendment privilege as well as when they did so, and paragraph 12 identifies by company title a specific person who invoked the privilege. The petition for leave to appeal identifies the persons who invoked the privilege as "several current and former executives of the *Labatt* defendants." None of that information was in the published court opinion, and as Mr. Messina identifies no other independent public source, it is still protected.

Mr. Messina's next defense is an explanation as to why he failed to follow the procedures outlined in the 1995 contempt order and to seek my prior approval to publish the information. With reference to the petition for leave to appeal, he says that he "concluded that it would be futile to seek this court's approval before filing the petition, . . . based on this court's August 1996 and March 1998 rulings, which denied him the right to speak for his clients even though he had demonstrated that his speech would be based on public sources." Mr. Messina chooses an ill-advised way to express his disagreement with my prior decisions; the appropriate way, as he most certainly knows, is to appeal the decisions themselves. In any event, past disagreement with a judge is not a defense to the conscious disregard of a court's valid, existing order. Ironically, Mr. Messina's explanation serves only to establish clearly that the decisions to include the disputed material and not to comply with the procedures of the 1995 contempt order were conscious and willful.

Mr. Messina next argues that application of the terms of the 1995 contempt order to the petition for leave to appeal constitutes regulation of the practice of law in the

state court, which I lack jurisdiction to regulate. To the contrary, I am prohibiting him from distributing information to the public through open court files. Had Mr. Messina sought leave to file the petition for leave to appeal under seal, I might be more inclined toward the merits of his argument.

Finally, Mr. Messina indirectly raises the defense that the 1995 contempt order constitutes an unconstitutional prior restraint on his First Amendment rights by citing and attaching an affidavit expressing the opinion of Boston College Law Professor, Arthur L. Berney, on the subject. As I previously addressed the constitutionality of the prior restraint in issuing the 1995 contempt order and Mr. Messina argued it to the Seventh Circuit in his appeal of that order, and as the Seventh Circuit has affirmed the validity of the order, I do not believe the argument merits attention here. Whatever Professor Berney's thoughts on the subject, the path of certiorari does not run from the Seventh Circuit to Boston College.

To hold a party or witness in civil contempt, "the district court must be able to point to a decree from the court which sets forth in specific detail an unequivocal command which the party [or witness] in contempt violated." *See Jones v. Lincoln Electric Co.*, 188 F.3d 709, 737 (7th Cir. 1999). Here, there is no longer any question that the orders, which have been examined and affirmed by the Seventh Circuit, are valid and of reasonable specificity. In light of the extensive history of this case, Mr. Messina's prior experience with disclosing this information, the reasons he submits in his defense, and the undisputed facts raised here, I find that Mr. Messina knowingly evaded my orders. Sadly, these two instances demonstrate once again that Mr. Messina freely decides on his own

whether to obey the orders of a court. He has shown that his purpose and intent was to evade my rulings first by including confidential information of slight, and perhaps questionable, materiality in his filings and then by bypassing judicial process altogether by thumbing his nose at procedures designed to help him stay out of the very trouble he is now in.

Accordingly, I have no choice but to find Mr. Messina in civil contempt for including in the affidavit he submitted to the Bankruptcy Court and in the petition for leave to appeal filed in the Illinois Supreme Court confidential information that is subject to the protective orders in this case. I also find him in civil contempt for violating the terms of my 1995 contempt order by failing to follow the procedures outlined in that order before publicly disclosing information about this case.

Defendants ask me to extend the terms of the 1995 contempt order for a period of three years and to order forfeiture of the $50,000 bond. Based on my previous observations of Mr. Messina's conduct and his conduct over the past five years, I do not believe that these violations, while plainly violative of my orders, are of the same scope or degree as the prior ones. As time passes the potential danger from dissemination of the confidential information also lessens. Accordingly, I will not extend the prior restraint provisions in the 1995 contempt order, nor order forfeiture of the entire $50,000 bond, and instead sanction him $7,500. This sanction is designed to compel Mr. Messina into future compliance with the existing orders and to cover the costs incurred by the defendants in bringing this motion. Finally, I want to make explicit that while the prior approval procedure is not being extended,

the protective and seal orders are still in place and must be followed by Mr. Messina, as well as by all persons.

ENTER:

/s/ James B. Zagel
James B. Zagel
United States District Judge

DATE: 8 June 2000

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GROVE FRESH DISTRIBUTORS, INC., an Illinois corporation,	)	No. 90 C 5009
Plaintiff,	)	
vs.	)	
JOHN LABATT LIMITED, a Canadian corporation, et al.,	)	Chicago, Illinois Monday, July 10, 2000 10:30 o'clock a.m.
Defendants.	)	Room 2103

REPORT OF PROCEEDINGS
BEFORE THE HONORABLE JAMES B. ZAGEL

APPEARANCES:

For JOHN LABATT LIMITED:	McDERMOTT, WILL & EMERY 227 West Monroe Street Chicago, Illinois 60606-5096 BY: MR. THOMAS D. SHAKESHAFT
For AMERICAN CITRUS:	BELL, BOYD & LLOYD Three First National Plaza 70 West Madison Street Suite 3300 Chicago, Illinois 60602 BY: MR. STEVEN M. KOWAL
For MR. JOHN P. MESSINA:	COHEN & COHEN 4501 Fairfax Avenue Palatine, Illinois 60067 BY: MR. STUART D. COHEN
Court Reporter:	MR. ANTHONY W. LISANTI United States Courthouse 219 South Dearborn Street Chicago, Illinois 60604 (312) 939-2092

[2] THE CLERK: 90 C 5009. Grove versus LaBatt, et al.

MR. COHEN: Good morning, your Honor, Stuart Cohen on behalf of Mr. Messina.

MR. KOWAL: Good morning, your Honor, Steven Kowal for the American Citrus defendants.

MR. SHAKESHAFT: Good morning, your Honor, Tom Shakeshaft for John Labatt.

THE COURT: I have before me the motion for recusal which I deal with first.

John Messina moves for recusal pursuant to both §§ 144 and 455 and the various subdivisions.

The motion is not timely under 144. The statute requires recusal motions be filed "not less than ten days before the beginning of term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time."

Mr. Messina's theory of timeliness, so far as I understand it, is as follows: the perceived bias and prejudice did not become manifest until June, 1995, when I issued the contempt order. Between August, 1995, and July, 1998, Mr. Messina's appellate counsel had an undisclosed conflict of interest that precluded him from making an informed decision about whether to request recusal. Defendant's May, 2000, motion for a rule to show [3] cause was the first proceeding against Mr. Messina since appellate counsel disclosed its conflict of interest. Therefore, Mr. Messina asserted his § 144 claim within a reasonable time period after that motion was filed.

I find the § 144 motion is untimely because Messina has not shown good cause for waiting until this time to file the affidavit. Even accepting his reasons for waiting, he had all the information in hand as of July, 1998, and was aware of all conflicts and should have filed it at that time. A five-year contempt order was in place at that time, so the case was certainly a live one when he knew all that he knows now.

Even accepting Mr. Messina's reasons for waiting until the Rule 60(b) motion was filed, there is no reason why that motion could not have been filed much earlier.

Ultimately, the question of untimeliness is inconsequential, because the bias and prejudice analysis is the same under § 455. My ruling with respect to 455 will be considered along with the merits of the 144 motion. The 144 motion merit [sic] consideration as an alternative ruling.

The motion for recusal is timely under 455. Congress placed no time requirements on a Judge's duty to consider recusal under 455 and I am not reading one into [4] the statute.

There are some substantive grounds for refusal. First, that I have a personal bias and prejudice:

(a) In favor of defendants John Labatt Limited and Everfresh Juice Company because of my "longstanding friendship with their attorney, David Stetler".

(b) Because I have a personal bias and prejudice against Mr. Messina, stemming from his refusal to comply with the terms of the settlement agreement by honoring the consulting agreement between him and the defendants.

Also, I am, it is said, a material witness in the Rule 60(b) proceeding, which is pending in this case. Finally, my impartiality in the Rule 60(b) proceeding might reasonably be questioned, so recusal is necessary under § 4135(a).

I take these in turn:

1. The bias in favor of the defendants, because of my purported friendship with David Stetler.

Under 455, I am permitted to "contradict the evidence with facts drawn from my personal knowledge". The Seventh Circuit said so in the Balistrieri case, 779 F.2d 1191. In this case, I state unequivocally that Mr. [5] Stetler and I do not have the kind of close personal friendship that would require me to recuse myself from cases in which he represents a party. Indeed, I have no close personal friendship with Mr. Stetler. Our relationship is purely professional. We have had no non-law-related social intercourse. By that I mean I don't believe we have ever met each other outside of the courtroom except for legal meetings of various kinds.

Frankly, even if under § 144 I am obliged to accept the truth of what is asserted. Mr. Messina does not actually state that Mr. Stetler and I have a longstanding relationship. What he states is that some third person, Mr. Hoover, told him that I had such a relationship. A friendship and a personal relationship, the existence of which is a conclusion, is one based on objective facts, and no objective facts are alleged. I don't have to accept conclusions, opinions or rumors as the Seventh Circuit pointed out in United States versus Barnes 909 F.2d 1059. The allegation is unsupported by any facts and therefore I give it no credence and I do not have to give it credence.

The bias against Mr. Messina.

Mr. Messina and I did not know each other, so far as I can recollect, before this litigation began and we still do not know each other outside the course of [6] his appearances in cases before me. He believes my bias against him stems from his refusal to honor a consulting agreement he entered into with the defendants in this case as part of the case's settlement. Having already ruled out any bias I might have towards the defendants based on Mr. Stetler's representation in this case, I do not believe that an objective person would find that Mr. Messina's actions would cause me to be prejudiced against him. I, like all Federal Judges, am result-neutral in case management. My salary is the same whether I try the case or it settles early, or late, and if I am not working on this case there will be another one. It is unreasonable to infer that a Judge will develop a bias against the person who causes a settlement to fall apart.

Mr. Messina next argues that regardless of the actual source of my purported bias against him, my actions have been "so extreme as to display a clear inability to render a fair judgment". The quote is from Litkey versus United States, 510 U.S. 551. These, Mr. Messina says, are themselves grounds for recusal. He points to seven actions, which I will consider in turn. At the outset I note that five of the seven are judicial rulings, which the Supreme Court in Litkey said, "almost never constitute a valid basis for a bias or partiality motion".

[7] First, he believes that I ruled inconsistently by in December, 1994, sustaining the plaintiff's claim of attorney-client privilege over several memorandums exchanged between Mr. Messina and Grove Fresh after January 21,

1993, thereby implying an attorney-client relationship, and in finding in the June, 1995, contempt order that Grove Fresh had fired him as counsel on January 21, 1993.

First, the judicial rulings and any inconsistency between them could and should have been taken to the Court of Appeals, which heard and ruled on his appeal of my June, 1995, contempt order. Second, the rulings are not even on their face inconsistent. The rulings were made in different contexts. The attorney client privilege is broadly construed to protect the client, whose privilege it is, and communications from a client to one who the law would consider a former attorney, may yet be protected by the attorney-client privilege.

This is very different from rulings having to do with the precise status of the attorney. Given that the rulings are not inherently inconsistent, and even if they were, Judges are entitled to make mistakes, this is exactly the kind of thing the Supreme Court envisioned as better handled by appeals, than recusal motions.

[8] Mr. Messina believes my findings in the contempt proceedings regarding Mr. Messina's credibility on the issue of when the attorney-client relationship ended is insupportable on the evidence that came in at the hearing, and he says that no contradictory evidence was presented. Mr. Messina is obviously operating on the premise that if a witness says the sun rises in the west and no witness rises to contradict him, then at least for the purpose of that litigation a finding that the sun rises in the west is mandated. This is not true. Even uncontradicted testimony can be found to be not credible, and credibility findings, I note, are uniquely within the province of the trial Judge. It is

hard to find a claim of bias on them. There is obviously no requirement that contradictory evidence be presented on each point before a trier of fact finding that a person is incredible. I was present, I observed his demeanor, I stand by those findings.

Although I do remark with respect to this aspect and one other aspect. Mr. Messina's motion to recuse, I understand the human aspect of his belief that I ought to recuse myself. Because I have, in fact, found that he was unbelievable, which is certainly not a pleasant thing to endure. While it is understandable he would seek to recuse me, or at least think about seeking [9] to recuse me on those grounds, it is not an adequate ground.

He believes that the findings of criminal contempt in the contempt order establish grounds for recusal when the proceedings [sic] had been promised to be a civil contempt proceeding only, and that this demonstrates my bias.

I note first that the findings were vacated, as I found belatedly that I had not given Mr. Messina fair notice. Given that I vacated the criminal sanctions myself, I do not believe a reasonable person would find the criminal sanctions themselves so insupportable as to show my utter failure to use fair judgment. The findings themselves were, I thought, supported by my written findings, and were vacated for procedural reasons, not substantive ones. These are, again, judicial rulings which rarely form the basis for grounds for recusal.

Secondly, Mr. Messina seems to imply that my decision to publish the June, 1995, contempt order in the F. Supp. without either redacting the findings of criminal contempt, or with a note indicating that the criminal sanctions had been withdrawn, is evidence of my prejudice

against him. As all attorneys well know, the F. Supp. is not the final word on a case's final resolution, [10] or a person's character.

District Court Judges publish opinions there because they believe their research and legal reasoning will be helpful to others. For that purpose, no redaction is necessary and are [sic] not customary, so far as I understand the practice of most Judges with respect to F. Supp. Certainly, the failure to redact or to append something indicating that the criminal contempt was vacated does not show total failure to exercise fair judgment. No objective person would find this to be biased conduct.

Mr. Messina believes that I wrongfully entered the functional equivalent of an injunction against Messina's representation of State Court clients.

This, to me, is again the citing of what was a straightforward judicial ruling that was best the subject of an appeal, not a recusal motion. I entered the restriction because based on my personal observations of his conduct and the existing protective orders I thought it impossible for him to represent those clients without violating the orders. The danger was simply too high.

He believes that the statements I made in the contempt order about sealing the case because Mr. Messina was litigating this case on the courthouse steps are false and demonstrate bias.

[11] Those comments were made on the conduct I personally observed. Mr. Messina may disagree about my characterization of his conduct, but they are my observations based on what I saw in the case before me, and in my view accurately characterized his conduct – bearing in

mind that we are dealing with a metaphor here because there are no courthouse steps in this particular courthouse. The Seventh Circuit has affirmed my decision to seal the case.

He believes that I interfered with the creation of a record by preventing the creation of a docket during the first five years of the case, and by accepting and keeping in chambers all copies of papers and orders that were filed.

I begin by noting that there was an appeal in the case on a record which apparently satisfied Mr. Messina. So I am not sure that I entirely understand the purport of his grounds for recusal.

Under § 455, in any event, I need not accept the truth of these facts if I know the truth to be otherwise. First of all, it is true that no docket sheet was created until the case went up on appeal in 1995. I am told by the Clerk's office that this is standard procedure in this Court. It is also true that the filings were made in chambers, but, contrary to Mr. Messina's [12] allegations, my Clerk informs me that the originals were kept on the twentieth floor, which is the Clerk's office. It is not unusual for Judges to keep copies of papers filed in their chambers. Indeed, most Judges, myself included, require the filing of an extra copy, a courtesy copy for the Judge.

In any event, even if the proper procedures were not followed Mr. Messina has not shown that I intended that to happen, and I state unequivocally that I did not order anything but the standard procedures for sealed cases. I sealed the case and expected and understood that the proper procedures were in place. Absent some showing that a Judge specifically intervened in the docketing duties of his Clerk, which was not shown or alleged, I do

not think reasonable persons could find variations in the process attributable to the Judge, let alone the basis for a finding of bias. And, indeed, that finding would apply equally under 144 if I were to take the facts exactly as stated in Mr. Messina's affidavit.

Finally, and related to the previous one, the claim that interference with Mr. Messina's right to appeal by refusing his request made to my minute Clerk to provide copies of certain documents to the Clerk's office during the preparation of the appeal.

Mr. Messina made three requests of my [13] minute Clerk within three weeks to provide documents to the Clerk's office for use in preparing the record on appeal. He said that I refused them. I can find no record of such rulings and do not believe that I personally ruled on the request either way during that time period. This issue, too, soon became moot because the parties settled the dispute in which he was trying to intervene. Any failure on my part to respond to his request during that time period does not constitute bias.

Given the workload of a District Court Judge and the average ruling time for many Judges on this Court, such a lag in response time is hardly evidence of bias. What he calls interference was simply a failure to respond in what he believed to be a timely manner. No reasonable person could find bias on these facts.

Under 455(b)(5)(iv), it is argued that I ought to recuse because I am a material witness to the 60(b) proceeding.

The argument is: the Rule 60(b) [sic] based in part on my perceived interference with the performance of the Clerk of the Court's official duty to create and maintain an

official record of this case, and to timely transmit that record to the Court of Appeals. 455(b)(5) says, and I am going to quote it because the language is awkward – it basically says – a Judge shall [14] disqualify himself, if he is to the Judge's knowledge, likely to be a material witness in the proceeding.

I do not consider myself a material witness in this matter. The inquiries focused on how this case was docketed, and it is the persons who handle those functions who are best suited to testify about these matters. There is nothing in the statute that says a Judge must recuse himself or herself if a member of the Judge's staff is a material witness. Members of the twentieth floor Clerk's office could also provide the necessary information about what procedures were followed in this case.

I have, in fact, searched my memory and I have no recollection of making any decision with respect to the manner and form in which papers were filed in this case, other than my decision, long the subject of contest, to seal the proceedings.

Finally, Mr. Messina moves to recuse under 455(a) on the grounds that my impartiality in the Rule 60(b) proceeding might reasonably be questioned.

Well, § 455(a) was intended to expand the scope of recusals so that a Judge could recuse himself or herself even if one of the direct requirements of the other provisions was not met, it was never intended to obliterate those requirements completely. As I have [15] explained, the provisions of 144 and 455 do not necessitate my recusal in this case, and 455(a) does not change that at all as the question of bias is not, in my view, even a close one. At bottom, Mr. Messina simply objects to many of my

rulings in this case. I reiterate, as I have said with respect to one of the specific grounds, this is not surprising, for the rulings have not been routine, nor have they often been in his favor. I found his behavior in this case unacceptable, as conduct unbecoming an attorney, and it would be a very odd person indeed who was not to some degree personally offended by my rulings unless he were in complete agreement with them and Mr. Messina is not in complete agreement with them. But it is a Judge's job to render judgments and in our adversary system to give some parties ruling that they do not like. All of these objections to my rulings were grounds for appeal, which Mr. Messina took; they are not evidence of bias. The motion is denied.

That is all I am prepared to deal with today. I have the 60(b) motion. I have a motion to file an affidavit in support of it, and maybe one or two other things. I will issue an appropriate minute order.

The only thing that I will pause for is a decision by Mr. Messina, whether he wishes to seek mandamus in this matter on the denial of recusal. I [16] intend to pause for ten days to allow that decision to be made. Ten days is when?

THE CLERK: That will be July 19.

THE COURT: If I do not hear from counsel that he has or intends shortly to file such a petition, then I will go ahead and enter an appropriate scheduling minute order or any other minute order I deem appropriate with respect to the pending motions.

Thank you, counsel.

MR. COHEN: I have one question. Will the memorandum opinion be available?

THE COURT: No. The minute order will read – "For the reasons stated in open Court the motion to recuse is denied."

MR. KOWAL: Your Honor, may I raise two brief issues?

THE COURT: Sure.

MR. KOWAL: First, in Court on a previous occasion we discussed the recusal motion, I mentioned to your Honor the letter that David Stetler had sent to counsel including Mr. Cohen. I had no time to file it. Would it be appropriate for me to ask leave to file that letter so it be part of the record on appeal?

THE COURT: If you wish, sure.

MR. KOWAL: Secondly, although I had previously [17] asked for the Court's permission to transmit certain documents to Russ Hoover at Jenner & Block, I don't believe I specifically asked for the Court's permission on the 60(b) memorandum that was filed. I would like to be able to do that.

THE COURT: Leave is granted.

Anything further – thanks.

MR. COHEN: Thank you.

I certify that the foregoing is a correct transcript of the original shorthand notes of proceedings in the above-entitled matter.

/s/ Anthony W. Lisanti 7-17-000
Official Court Reporter Date

Minute Order Form (06/97)

United States District Court,
Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	James B. Zagel	Sitting Judge If Other than Assigned Judge	
CASE NUMBER	90 C 5009	**DATE**	10/10/2000
CASE TITLE	GROVE FRESH vs. LABATT, ETAL		

[In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3rd party plaintiff, and (b) state briefly the nature of the motion being presented.]

MOTION:

DOCKET ENTRY:

(1) ☐ Filed motion of [use listing in "Motion" box above.]

(2) ☐ Brief in support of motion due ___.

(3) ☐ Answer brief to motion due ___. Reply to answer brief due ___.

(4) ☐ Ruling/Hearing on ___ set for ___ at ___.

(5) ☐ Status hearing [held/continued to] [set for/re-set for] on ___ set for ___ at ___.

(6) ☐ Pretrial conference [held/continued to] [set for/re-set for] on ___ set for ___ at ___

(7) ☐ Trial [set for/re-set for] on ___ at ___.

(8) ☐ [Bench/Jury trial] [Hearing] held/continued to ___ at ___.

(9) ☐ This case is dismissed [with/without] prejudice and without costs [by/agreement/pursuant to]

	☐ FRCP4(m) ☐ General Rule 21 ☐ FRCP41(a)(1) ☐ FRCP41(a)(2).
(10)	■ [Other docket entry] **Motion (519-1) to vacate is denied. Motion (529-1) to reconsider is denied. Motion (531-1) for leave to file affidavit is granted.**
(11)	☐ [For further detail see order (on reverse side of/attached to) the original minute order.]

	No notices required, advised in open court.	Filed Oct 17, 2000
	No notices required.	
	Notices mailed by judge's staff.	
	Notified counsel by telephone.	
✓	Docketing to mail notices.	
	Mail AO 450 form.	
	Copy to judge/magistrate judge.	Date/time received in central Clerk's Office
DW	courtroom deputy's initials	

number of notices	**Document Number**
OCT 16 2000 date docketed	536
/s/ ean docketing deputy initials	
date mailed notice	
mailing deputy initials	

Minute Order Form (06/97)

United States District Court,
Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	James B. Zagel	Sitting Judge If Other than Assigned Judge	
CASE NUMBER	90 C 5009	**DATE**	11/14/2000
CASE TITLE	GROVE FRESH vs. LABATT		

[In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3rd party plaintiff, and (b) state briefly the nature of the motion being presented.]

MOTION:

DOCKET ENTRY:

(1) ☐ Filed motion of [use listing in "Motion" box above.]

(2) ☐ Brief in support of motion due ___.

(3) ☐ Answer brief to motion due ___. Reply to answer brief due ___.

(4) ☐ Ruling/Hearing on ___ set for ___ at ___.

(5) ☐ Status hearing [held/continued to] [set for/re-set for] on ___ set for ___ at ___.

(6) ☐ Pretrial conference [held/continued to] [set for/re-set for] on ___ set for ___ at ___

(7) ☐ Trial [set for/re-set for] on ___ at ___.

(8) ☐ [Bench/Jury trial] [Hearing] held/continued to ___ at ___.

(9) ☐ This case is dismissed [with/without] prejudice and without costs [by/agreement/pursuant to]

	☐ FRCP4(m) ☐ General Rule 21 ☐ FRCP41(a)(1) ☐ FRCP41(a)(2).
(10)	■ [Other docket entry] **Motion (538-1 and 539-1) is denied for the reasons stated in open court.**
(11)	☐ [For further detail see order (on reverse side of/attached to) the original minute order.]

✓	No notices required, advised in open court.	Filed MAY 15, 2001
	No notices required.	
	Notices mailed by judge's staff.	
	Notified counsel by telephone.	
	Docketing to mail notices.	
	Mail AO 450 form.	
	Copy to judge/magistrate judge.	
DW	courtroom deputy's initials	Date/time received in central Clerk's Office

number of notices	**Document Number**
MAY 16 2001 date docketed	553
/s/ CM docketing deputy initials	
date mailed notice	
mailing deputy initials	

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GROVE FRESH DISTRIBUTORS, INC., an Illinois corporation,	)	No. 90 C 5009
Plaintiff,	)	Chicago, Illinois
vs.	)	Tuesday, November 14, 2000
JOHN LABATT LIMITED, a Canadian corporation, et al.,	)	10:30 o'clock a.m.
Defendants.	)	Room 2103

REPORT OF PROCEEDINGS
BEFORE THE HONORABLE JAMES B. ZAGEL

APPEARANCES:

For JOHN LABATT LIMITED:

McDERMOTT, WILL & EMERY
227 West Monroe Street
Chicago, Illinois 60606-5096
BY: MR. THOMAS D. SHAKESHAFT

For AMERICAN CITRUS:

BELL, BOYD & LLOYD
Three First National Plaza
70 West Madison Street
Suite 3300
Chicago, Illinois 60602
BY: MR. STEVEN M. KOWAL

For MR. JOHN P. MESSINA:

COHEN & COHEN
4501 Fairfax Avenue
Palatine, Illinois 60067

BY: MR. STUART D. COHEN
Court Reporter:

MR. ANTHONY W. LISANTI
United States Courthouse
219 South Dearborn Street
Chicago, Illinois 60604
(312) 939-2092

[2] THE CLERK: 90 C 5009, Grove Fresh versus LaBatt, et al.

MR. COHEN: Good morning, your Honor, Stuart Cohen on behalf of John Messina.

MR. KOWAL: Steven Kowal for American Citrus.

MR. SHAKESHAFT: Good morning, your Honor, Tom Shakeshaft on behalf of John Labatt Limited.

MR. COHEN: Judge, we are here on behalf of Mr. Messina's two motions – to first renew a motion for recusal, and second a Rule 59 motion for rehearing. We have filed papers on those motions and we ask the Court to set a briefing schedule on both of these issues.

THE COURT: I have read both motions and both motions are denied.

What is left to do now?

MR. KOWAL: Your Honor, there is one issue relating to the papers that were filed by Mr. Cohen on the most recent motions. None of those pleadings were filed under seal. I had reminded Mr. Cohen in correspondence that it is my recollection at least that this Court has ordered, and we have consistently acted under that order, that all pleadings initially, at least, be filed under seal

until such time as the court determined that that was not necessary. In this instance I think it sort of demonstrates why that procedure should remain in effect. [3] There are twenty-six pages in Mr. Messina's affidavit that deal with discovery matters from the underlying case. My belief, and the Court's order, is that those matters remain under seal and subject to the protective orders that were entered in the underlying litigation. For that reason these pleadings, along with everything else that has been filed, should have been filed under seal.

I would ask that your Honor order Mr. Cohen to remove them from the file and file them properly under seal.

THE COURT: So ordered.

MR. COHEN: Do I get a chance to respond, your Honor?

THE COURT: Sure.

MR. COHEN: This case was under seal in 1995. At that point in time the docket was created. While there is a continuing protective order and seal order, that, in my understanding, related to a very limited range of documents.

THE COURT: They didn't ask for sanctions against you, they just asked me to seal this and I am ordering it sealed. Remove it and seal it.

What you are telling me is why you thought that you could file it not under seal, which I am willing to concede that you might have thought that. But I am now [4] ordering you to remove it and file it under seal.

You are making an argument, I think, that is a counter if they asked you to be sanctioned, but they are not.

MR. COHEN: I am not sure what the purpose of filing it under seal –

THE COURT: I am ordering you to file it under seal. If you think that some of it ought to be released from seal, make a motion; I will be happy to consider it.

MR. COHEN: Okay.

THE COURT: What remains to be done?

MR. COHEN: I guess we had filed back in September, and continued the motion to set a supersedeas bond, and for the release of the performance bond. I have got copies here, we might be able to address that at this moment.

THE COURT: I actually thought I entered an order on some of that.

MR. COHEN: Not on this element. Essentially, your Honor –

THE COURT: Let me look this up. I actually thought that I had entered orders on this. Let me take a look.

The motion to grant the supersedeas bond for the seventy-five hundred dollars is granted. I will [5] take a look at the performance bond. I actually thought I had done something on this, so let me take a look.

MR. KOWAL: Your Honor, may I make a statement about the performance bond?

THE COURT: Sure.

MR. KOWAL: We would like to submit to the Court that the performance bond should remain with the Court at least until the time that litigation over these pending motions is resolved. I presume that –

THE COURT: You want to file papers on this?

MR. KOWAL: I could file a brief response, if you would like.

THE COURT: That would be fine. I will give you seven days to do that, but don't start for a couple of days to make sure that I have not already released the bond because I may have. But if you don't hear from me in two days you can file your piece of paper and you can file a counter in seven days after that.

Come back and see me in fifteen days and I will give you a ruling.

THE CLERK: November 29 at 10:30.

THE COURT: Thank you.

MR. KOWAL: Thank you, Judge.

MR. COHEN: Thank you.

[6] I certify that the foregoing is a correct transcript of the original shorthand notes of proceedings in the above-entitled matter.

/s/ Anthony W Lisanti
Official Court Reporter

12-1-000
Date

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GROVE FRESH DISTRIBUTORS, INC., an Illinois corporation, Plaintiff, v. EVERFRESH JUICE COMPANY and HUGO POWELL Defendants.	)	No. 89 C 1113 Judge Zagel

MINUTE ORDER DATED MAY 25, 1990

Defendant's motion for a protective order is granted with the agreed reduction of paragraph number 2.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GROVE FRESH DISTRIBUTORS, INC., an Illinois corporation,	)	No. 89 C 1113
	)	Honorable James B. Zagel
Plaintiffs,	)	
v.	)	
EVERFRESH JUICE COMPANY and HUGO POWELL	)	
Defendants.	)	

PROTECTIVE ORDER

This matter coming to be heard on defendants' motion for a protective order, in order to provide protection of confidential and proprietary information and to facilitate discovery sought in this action.

IT IS HEREBY ORDERED:

1. A party (hereafter referred to as a "Designating Party") may designate documents it considers to be of a confidential, proprietary or trade secret nature. Since designation can be made by applying a written statement such as "Confidential" or "Subject to Protective Order" on such documents. Such designation can also be made by the Designating Party informing other counsel in writing that certain documents or categories thereof are confidential. If the Designating Party has so informed other counsel of the confidential nature of documents, then the lack of a notation on documents shall not be considered a waiver of the right to seek protection of otherwise confidential information; however, the burden of avoiding confusion or

mistake as to what is, or is not, confidential shall always remain with the Designating Party.

2. Documents designated as confidential shall be used only for the preparation and trial of this lawsuit, and for no other purpose except as may be required by law or court process. If confidential documents are to be disclosed pursuant to law or court process, the Designating Party shall be given at least 10 days advance notice, before any party makes the disclosure, to afford the Designating Party an opportunity to object to such disclosure or to seek further appropriate relief.

3. If a party objects to the designation of any document as confidential, that party shall advise the Designating Party promptly, in writing, of the objections and the reasons therefor. In that event, all items so designated shall be treated as confidential material pending resolution of the dispute. If the parties involved fail to resolve the dispute among themselves, it shall be the obligation of the Designating Party to move promptly (i.e., within 10 days of the parties' failure to resolve the dispute among themselves) for a ruling from the Court concerning the confidentiality of the items in dispute. Nothing contained in this paragraph shall alter the burden of proof respecting the confidentiality of any materials.

4. All confidential documents and materials containing confidential information shall be returned to the Designating Party at the conclusion of this lawsuit.

DATE: May 25, 1990

ENTER:

/s/ James B. Zagel

JUDGE

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GROVE FRESH DISTRIBUTORS, INC., an Illinois corporation,	No. 90 C 5009
	Judge Zagel
Plaintiff,	Filed Under Seal Pursuant to Court Order
v.	
JOHN LABATT LIMITED, a Canadian corporation, et al.,	
Defendants.	

MINUTE ORDER DATED AUGUST 28, 1990

Plaintiff's motion to file case under seal is granted. The complaint and all subsequent pleadings shall be filed under seal until further order of court.

GROVE FRESH DISTRIBUTORS, INC., an Illinois corporation, Plaintiff, v. JOHN LABATT LIMITED, a Canadian corporation, et al., Defendants.

NO. 90 C 5009

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

June 9, 1995 Decided

June 13, 1995, DOCKETED

COUNSEL:

For GROVE FRESH DISTRIBUTORS, INC., an Illinois corporation, plaintiff: Dale R. Crider, Warren S. Radler, Rivkin, Radler & Kremer, Chicago, IL. Dorothy B. Zimbrakos, Attorney Registration & Disciplinary Commission, Chicago, IL. John P. Messina, Attorney at Law, Chicago, IL.

For AD HOC COALITION OF IN DEPTH JOURNALISTS, intervenor: Lawrence Walner, Robert J Walner, Lawrence Walner & Associates, Ltd., Chicago, IL.

For ALBERT ACE ALLEN, MICHAEL E ALLEN, defendants: Royal B. Martin, Jr., Martin, Brown & Sullivan, Ltd. Chicago, IL. Locke E. Bowman, III, Chicago, IL.

For GROVE FRESH DISTRIBUTORS, INC., counter-defendant: Dale R. Crider, Warren S. Radler, Rivkin, Radler & Kremer, Chicago, IL. Dorothy B. Zimbrakos, Attorney Registration & Disciplinary Commission, Chicago, IL. John P. Messina, Attorney at Law, Chicago, IL.

JUDGES:

James B. Zagel, United States District Judge

OPINION BY:

James B. Zagel

OPINION:

MEMORANDUM OPINION AND ORDER CONTAINING FINDINGS OF FACT AND CONCLUSIONS OF LAW

The perfect tragic figure, according to Aristotle, is "a man not preeminently virtuous or just, whose misfortune, however, is brought upon him not by vice and depravity but by some error of judgment. . . ." Aristotle, *The Poetics* 238 (Friedrich Solmsen ed. & Ingram Bywater trans., Modern Library 1954). The great heroes of tragedy conformed to the Aristotelian conception of a great man whose unkind fate is precipitated by a tragic "flaw" in his personality. Thus, Othello's downfall was the result of his own jealousy, MacBeth fell victim to his blinding ambition, Lear's insecurity prompted his misfortunes, and Hamlet's tragedy was that of a man who could not make up his mind. John Messina fits the mold of the great tragic figure. His is the tragedy of an attorney who could not keep a confidence.

The confidences Mr. Messina could not keep were protected by court orders of confidentiality. Mr. Messina's past behavior played a pivotal role in the granting of these orders, since it appeared that he would go to any lengths to try his case on the courthouse steps rather than in the courtroom itself. That Mr. Messina sincerely, even fervently, believed in the unremitting badness of the defendants in this case is beyond doubt, as was his willingness to hurt them by disseminating information for purposes of damaging them outside the walls of the courtroom. The orders of confidentiality were meant to prevent Mr.

Messina's misuse of the litigation to pursue his own agenda. But the evil to be prevented by the orders was the evil that actually ensued.

Undeterred by repeated court warnings, possible harm to his client's interests, and, apparently, his own fate, Mr. Messina continued to disclose protected information. His propensity to reveal court protected secrets is the Aristotelian flaw which precipitated his present predicament: possible sanctions for contempt and for violations of Rule 11. Mr. Messina stands accused not only of violating this court's orders of confidentially, but for failing to appear in court as ordered and for making misrepresentations to the Seventh Circuit Court of Appeals. Since the "first essential, the life and soul, so to speak, of Tragedy, is the plot," *id.* at 232, some history is in order.

Background

Mr. Messina represented the plaintiff, Grove Fresh Distributors, Inc., in two separate but related suits filed against competing orange juice manufacturers for allegedly engaging in a conspiracy to unlawfully adulterate and misbrand orange juice in violation of various federal laws.

Grove Fresh filed the first suit against Everfresh Juice Company in 1989 (*Grove Fresh Distributors v. Everfresh Juice Co.*, No. 89 C 1113)[1] The genesis of the second suit (*Grove Fresh Distributors, Inc. v. John Labatt, Ltd.*, 888 F. Supp. 1427) began when Mr. Messina

[1] This case was eventually dismissed pursuant to the defendants' successful motion for summary judgment in February of 1992.

concluded that Grove Fresh had claims against John Labatt, Ltd. – the parent of Everfresh – similar to its claims against Everfresh. Mr. Messina sent Everfresh's counsel a demand letter seeking payment of claims on 23 August 1990. The letter gave notice that Mr. Messina would file a new complaint on behalf of Grove Fresh if Labatt did not settle.

On 24 August 1990, Labatt presented an emergency motion to seal the new complaint described in Mr. Messina's letter, arguing that the new complaint was an illegitimate attempt to amend the complaint in case No. 89 C 1113 (then 18 months old and nearing the close of discovery). Contending that Grove Fresh's motive in filing this new complaint was "to evade and disregard the earlier rulings made by this Court" in case No. 89 C 1113 on procedural issues and the discovery schedule, Labatt prayed for an order "requiring Grove Fresh to immediately submit its new complaint to this court under seal."

On 29 August 1990 I granted the motion to seal the complaint for case No. 90 C 5009. A key reason behind this decision was Mr. Messina himself. After presiding for the previous eighteen months over case No. 89 C 1113, I was familiar with certain tactics employed by Mr. Messina which I believed were questionable if not reprehensible. Specifically, I was wary of Mr. Messina's repeated attempts to beat the defendants into submission by disclosing materials previously designated as confidential to generate unfavorable publicity for them.[2] I had no reason

[2] Especially alarming was Messina's propensity to disregard court orders and include documents designated as confidential as attachments to his pleadings (which would then be put into the public record

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to believe Mr. Messina would change his methods and every reason to suspect he would attempt to try his latest suit on the courthouse steps as well.

Given the relatedness of the two cases and their litigants, and my familiarity with both, I felt it unnecessary to reiterate in my sealing order for the new case what seemed painfully clear from the lessons, and record, of No. 89 C 1113. The minute order granting the seal in No. 90 C 5009 therefore simply stated:

> Defendants' [sic] motion to file case under seal is granted. The complaint and all subsequent pleadings shall be filed under seal until further order of court.

Three days later I heard arguments regarding a motion by Grove Fresh to lift the seal. After a brief colloquy, I stated that the "motion to lift the seal is denied without prejudice to you raising it after we deal with whatever pretrial motions there are with respect to dismissing the complaint." I later denied various motions to dismiss the case, but did not explicitly refer to the emergency motion to seal.

On 1 May 1991 I signed a stipulated protective order "in order to provide protection of confidential and

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or forwarded to the press). An emergency motion seeking to restrain Messina from making prohibited disclosures would inevitably follow. *See* e.g., Minute Order of 10/3/90 Ordering Messina Not to Publish His 10/1/90 Letter to the Press and Ordering Him to Comply With the Court's Ruling; Minute Order of 7/18/90 Granting Motion to Enforce Protective Order in 89 C 1113.

proprietary information and to facilitate discovery."[3] As Grove Fresh's attorney at the time, and therefore a

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[3] This protective order, similar if not identical to one entered in the earlier case, read as follows:

IT IS HEREBY ORDERED:

1. A party (hereinafter referred to as a "Designating Party") may designate documents it considers to be of a confidential, proprietary or trade secret nature. Such designation can be made by applying a written statement such as "Confidential" or "Subject to Protective Order" on such documents. Such designation can also be made by the Designating Party informing other counsel in writing that certain documents or categories thereof are confidential. If the Designating Party has so informed other counsel of the confidential nature of documents, then the lack of a notation on documents shall not be considered a waiver of the right to seek protection of otherwise confidential information; however, the burden of avoiding confusion or mistake as to what is, or is not, confidential shall always remain with the Designating Party.

2. Documents designated as "confidential" shall be used only for the preparation and trial of this lawsuit, and for no other purpose except as may be required by law or court process. If confidential documents are to be disclosed pursuant to law or court process, the Designating Party shall be given at least 10 days advance notice, before any party makes the disclosure, to afford the Designating Party an opportunity to object to such disclosure or to seek further appropriate relief.

3. If a party objects to the designation of any document as confidential, the party shall advise the Designating Party promptly, in writing, of the objections and the reasons therefor. In that event, all items so designated shall be treated as confidential material pending resolution of the dispute. If the parties involved fail to resolve the dispute among themselves, it shall be the obligation of the Designating Party to move promptly (i.e., within 10 days of the parties' failure to resolve the dispute among themselves) for a ruling from the Court concerning the confidentiality of the items in dispute.

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signatory to the order, Mr. Messina agreed that "[d]ocuments designated as 'confidential' shall be used only for the preparation and trial of this lawsuit, and for no other purpose except as may be required by law or court process."

On 9 October 1991, intervenors in the case moved to vacate the seal. Ordering a fresh round of briefs on the seal's merits, I offered the defendants another chance to justify the seal and identify what it wanted to protect. On 29 November, Everfresh argued that the seal was originally ordered in the 90 case at Everfresh's request because plaintiff had threatened to file the action in the public record, if Everfresh did not pay a multimillion dollar settlement, with unsubstantiated scandalous allegations that would damage the reputation of Everfresh and others. Plaintiff's pleadings also incorporate and attach protected confidential information obtained through discovery. Had this court not placed the 90 case under seal, the unsubstantiated, scandalous allegations and information that were subject to the protective order would have been improperly disseminated into the public realm.

I agreed with the premise of this argument. On 20 November 1992, in an order partially granting intervenors' motion, I stated on the record that "the seal order in 90 C 5009 served to effectuate the purposes of the protective

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Nothing contained in this paragraph shall alter the burden of proof respecting the confidentiality of materials.

4. All confidential documents and materials containing confidential information shall be returned to the Designating Party at the conclusion of this lawsuit.

order entered in the earlier case," No. 89 C 1113.[4] Thus did I seek to incorporate by reference the protective order in the older case as a justification for the seal in the newer one.

I also put into the record my feeling that lifting the seal on the entire case was problematic, because the existence of the seal may have led the parties to believe that they could file papers containing discovery material that would not otherwise properly be put before the court. Another problem with lifting the seal stemmed from the nature of the complaint. As I said in the order, the complaint in this case contains allegations which would, if not filed in court and if untrue, be libelous. Some of those against whom allegations are made are not parties to the record and can never secure vindication. The business records, furthermore, contain information which the law customarily protects [such as] speculation and the unproved, untested conclusions in pleadings filed by lawyers under the loose requirements of Federal Rules of Civil Procedure 8 and 9.

On 21 January 1993, Grove Fresh discharged Mr. Messina as its attorney in the Grove Fresh litigation. On 29 April 1993, case No. 90 C 5009 was dismissed with prejudice pursuant to settlement.

Then, on 1 June 1993 intervenors renewed their motion to vacate the seal. This was denied. Intervenors appealed parts of this denial, which included the issue of

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[4] The stated purpose of that protective order, as well as its counterpart in No. 90 C 5009, was "to provide protection of confidential and proprietary information and to facilitate discovery. . . ."

whether this court should have issued a decision on the record justifying the seal.

In remanding the case back to me, the Seventh Circuit reiterated that it had yet to find "reversal per se appropriate" where a court had not made a point of articulating its findings and reasoning for entering an order limiting access. *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 898 (7th Cir. 1994). The Court of Appeals asked "only that in reaching its decision in this matter on remand that the district court specify the basis for its conclusions." *Id.* at 899. This decision was issued on 12 May 1994.

Continuing disclosures by Messina in apparent violation of the orders of confidentiality, and the motions that would inevitably follow to try and rein him in, gave me ample opportunity to follow the Court of Appeals request and elaborate for the record the seal's rationale. The first chance I had to do this was actually one month prior to the issuance of the Seventh Circuit's opinion. On 8 April 1994, acceding to Mr. Messina's request to clarify the seal order's scope, I discussed the reasons behind my orders of confidentiality at some length:

> Mr. Messina has not always been clear in his descriptions to me and perhaps even in his own mind as to what is in the public record and what is not otherwise in the public record and what had been discovered in the course of discovery and which is sealed here.

. . . [M]y past experience with Mr. Messina leads me to believe that I will then engage in a lengthy set of hearings in which we will have to carefully patrol the border between what came out of the court file and what's in the

public arena, and I don't want that to occur. I don't think it's good for the case. I don't think it's good for Messina. I think it will increase everybody's costs.

So my answer to you is that I would advise Mr. Messina not to speak about the case and what might possibly transgress the seal with anybody until we resolve the question of his alleged prior violation of the seal order.

To safeguard undue prejudice to anyone's rights, I laid out a process by which Mr. Messina should proceed before making any future disclosures:

Now I recognize that there may be circumstances in which there is some urgent need for him to consult, and if that occurs, it would be appropriate for him to come in with a petition saying I want to consult with so and so. In fact, I don't even think he has to say who it is he wishes to consult with, but I think he does have to tell me what it is that he wishes to say, and it would be very helpful if he comes in with such a petition, he delineates with chapter and verse what his public record source of these statements are.

So, basically it would be best if he spoke to no one about these matters until we resolve the questions of his liability for violating the seal on the one alleged – or two or three alleged violations that have already occurred without creating a problem for possible violations that I may also have to deal with. And the safety valve that I think I'm giving is that if he wants to show exactly what is in the public record and indicate that this is exactly what he wants to say, that's possible too, because I recognize it may be necessary for him to speak more quickly.

It also is a reason why we ought to move as expeditiously as possible to get at least the question of breaking the seal resolved.

And that's my response to your motion. So I guess in a sense I've granted your motion to clarify. I don't know if you're entirely pleased with the clarification, but I really think given Mr. Messina's history, that its best for him, best for this case, and certainly best in terms of consuming time with this Court that he hold his piece until the matter here is over, and I've given the one escape hatch in case that that's prejudicial to someone else's rights.

And the profound difficulty here is it's very difficult to erase from your mind what it is that you already know, and it's quite likely – at least it's quite risky that Mr. Messina may think that he's speaking from the public document, but because he hasn't laid out very carefully what he learned from each source, he's going to transgress the order and then we're going to have arguments about exactly what does fall within disclosure and what doesn't fall within the disclosure, and I don't want to get involved in that.

I sought to put Mr. Messina on his guard by giving him notice of the consequences that would follow any future transgressions:

> But the fact of the matter is I can't assign anybody to follow Mr. Messina around, and what Mr. Messina says is what Mr. Messina says. What I am doing is I'm granting your motion for clarification and I'm giving you and your client

> through you a warning about the further difficulties that might very well be created.[5]

To simply say, look the judge said you can talk about whatever it is you learned independent of this case is very, very cold comfort for Messina; and were I in his position I would not be charging ahead saying, well, thank God that dispute is over, because in my judgment given both my knowledge of Mr. Messina and what happens in other cases in which he's not involved, it just means the possibility that we're going to have more and expensive hearings.

Even Mr. Messina's then counsel recognized the danger in further disclosures when he expressly agreed with the propriety of increased sanctions:

> THE COURT: What happens if he [Mr. Messina] breaches it [the sealing order] a second time?
>
> MR. MINER: It would be appropriate to impose a more severe sanction on him.
>
> THE COURT: Yes.
>
> MR. MINER: I don't have any doubt of that.

It was not long after this that Mr. Messina once again made disclosures which appeared to violate my orders of confidentiality, and did so, moreover, without following the

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[5] Although my comments were directed to an absent Mr. Messina through his counsel, there is no doubt that they were subsequently read by Mr. Messina, who cited the transcript himself in a letter, dated 20 September 1994, sent to counsel for an intervenor. Mr. Messina admitted in deposition that he had reviewed, understood, and previously discussed the 8 April transcript prior to sending the letter. *See infra* part B.2.

specific procedure I had laid down on 8 April. Thus on 27 October 1994 I reiterated for the record the relationship between the orders and Mr. Messina's own behavior:

> . . . [T]he principal basis for the decision [to impose the sealing order] was the [sic] that I had litigation before me in which I had a lawyer for the plaintiff, Mr. Messina, who was convinced – I don't know about the justice of his own client's cause, but convinced beyond a shadow of a doubt, indeed the possibility of a doubt, of the badness of the defendants. And it also seemed to me that Mr. Messina was willing to use not the force of the law, but the force of public relations to beat the defendants into some sort of submission . . .

But most of what we could do here depends on the fact that lawyers go about lawyer's business, and they serve their clients rather than their own principal concerns, and that they generally obey orders of court and custom and practice of lawyers regarding discovery materials.

I gained an impression of Mr. Messina very early on that he was not likely to follow the well trod paths of custom. Indeed, I thought Mr. Messina might in fact be reluctant to obey court orders. One of the reasons that the sealing order was so broad was my concern that Mr. Messina would ignore any order that was not broad.

After reading a round of briefs on the continued advisability about keeping case materials sealed, and after engaging in a document-by-document review of all materials under seal and subject to the protective order (a time consuming task given the sheer amount of materials generated during the four plus years of litigation), I asked intervenor's counsel, on 21 November 1994, to draft an order to unseal the case pursuant to my orally stated

directions. On 1 February 1995, I ordered the file unsealed.

But although the case was unsealed, I was still faced with documents protected by a valid protective order, as well as confidential materials filed in reliance of the seal. My in camera inspection revealed that for some of these materials continued confidentiality was appropriate.[6] I therefore ordered the particularized redactions of certain words, phrases, names, etc., while allowing public access to most, if not all, of the documents in which the redactions were made.

In response to Mr. Messina's conduct during the course of the litigation, American Citrus Products Corp., and John Labatt Ltd., the defendants in the case, jointly petitioned the court for a finding of contempt and for other sanctions against Mr. Messina. On 3 February 1995, a hearing was held to afford Mr. Messina an opportunity to respond to the following charges:

First, that Mr. Messina is in contempt of court for repeatedly violating the seal and protective order of the 1990 case by his disclosures of confidential discovery materials in a brief filed with [sic] Seventh Circuit; in a letter to counsel for intervenors; and in a conversation to a reporter for the New York Times.

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[6] These consisted of commercially disparaging designations; references to alleged co-conspirators not named as defendants; discovery materials and revealing references to them; post-settlement proceedings; and confidential agreements (i.e., the settlement agreement) that would not have been filed but for the existence of a seal.

Second, that Mr. Messina is in contempt of court for failing to appear before me when directed to do so, a nonappearance for which I had previously issued a rule to show cause.

Third, that Mr. Messina is subject to Rule 11 sanctions for allegedly making false or misleading representations to the Court of Appeals regarding his status as Grove Fresh's attorney.

Defendants jointly pray that Mr. Messina be substantially fined, required to reimburse them for legal fees and costs incurred from his actions, ordered to refrain from further comment, and required to deposit with the court a substantial sum of money which would be forfeited by subsequent disobedience.

Contempt: Civil and Criminal

"The ability to punish disobedience to judicial orders is regarded as essential to ensuring that the Judiciary has a means to vindicate its own authority without complete dependence on other Branches." *Young v. U.S. ex. rel. Vuitton et Fils S.A.*, 481 U.S. 787, 796, 107 S. Ct. 2124, 95 L. Ed. 2d 740 (1987). Without such authority, the courts would be helpless in the face of open defiance of their orders:

> If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls "the judicial power of the United States" would be a mere mockery.

Id., quoting *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 450, 55 L. Ed. 797, 31 S. Ct. 492 (1911).

The nature of contempt may be civil, criminal, or both. The enforcement of an order through a civil contempt action is designed to serve either of two purposes: (1) to compel or coerce obedience to a court order; or (2) to compensate the parties for losses resulting from the contemnors non-compliance with a court order. *United States v. United Mine Workers of America,* 330 U.S. 258, 303-04, 91 L. Ed. 884, 67 S. Ct. 677 (1947).

While the purpose of civil contempt is essentially remedial, *Shakman v. Democratic Organization of Cook County,* 533 F.2d 344, 349 (7th Cir. 1976), the purpose of criminal contempt is primarily punitive, "to vindicate the authority of the court." *U.S. v. Bayshore Associates, Inc.,* 934 F.2d 1391, 1400 (6th Cir. 1991), citing *Gompers,* 221 U.S. at 441. The same conduct may be subject to both criminal and civil contempt sanctions. *Id.*

To support a federal civil contempt conviction, it must be proved: "(1) that the court entered a lawful order of reasonable specificity; (2) the order was violated." *Matter of Betts,* 927 F.2d 983, 986 (7th Cir. 1991). Criminal contempt requires an extra element be shown: "(3) the violation was willful."[7] *Id.* A jury trial and a standard of reasonable doubt are required for criminal contempt charges.[8] *Young,* 481 U.S. at 798-99. The elements of civil

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[7] While it is not necessary in instances of civil contempt for the petitioner to establish that the defendant's violation of the order was willful, *McComb v. Jacksonville Paper Co.,* 336 U.S. 187, 191, 93 L. Ed. 599, 69 S. Ct. 497 (1949), evidence of "willful and intentional conduct is relevant to determine the appropriate remedial relief." *Connolly v. J.T. Ventures,* 851 F.2d 930, 935 (7th Cir. 1988).

[8] In the recently decided *International Union, United Mine Workers of America v. Bagwell,* 129 L. Ed. 2d 642, 114 S. Ct. 2552 (1994), the

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contempt must be established by "clear and convincing evidence."[9] *Stotler & Co. v. Able,* 870 F.2d 1158, 1163 (7th Cir. 1989).

The critical features in determining whether contempt is civil or criminal are the substance of the proceeding and the character of the relief that the proceeding will afford. *Hicks on Behalf of Feiock v. Feiock,* 485 U.S. 624, 631, 99 L. Ed. 2d 721, 108 S. Ct. 1423 (1988). "If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court." *Id.,* quoting *Gompers,* 221 U.S. at 441.

The line between civil and criminal contempt, however, is often blurred since

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Supreme Court suggested that in criminal contempt sanctions, the right to a jury trial and proof beyond a reasonable doubt were now required for (1) "serious" criminal contempts involving imprisonment of more than six months; (2) indirect contempts involving out-of-court disobedience to complex injunctions (especially if elaborate and reliable factfinding is required), and which neither obstruct the court's ability to adjudicate nor pose substantial risk of deprivation from lack of a neutral factfinder; (3) "serious" fines (i.e., $52 million); and for (4) fines related to widespread, ongoing, out-of-court violations of a complex injunction, thereby making the court police the compliance with an entire code of conduct that the court itself has imposed. *Id.* at 2556-63.

[9] Civil contempt sanctions, or those penalties designed to compel future compliance with a court order, do not require a jury trial – just notice and the opportunity to be heard – if (1) the fine is compensatory and coercive (rather than merely punitive); (2) the fine is not compensatory, as long as it is petty and/or the contemnor is afforded the opportunity to purge; (3) the conduct occurring outside the court's presence impeded its ability to adjudicate the proceedings before it; and if (4) the indirect contempts involve discrete, readily ascertainable acts requiring little need for extensive, impartial factfinding. *Bagwell,* 114 S. Ct. at 2557-62.

> both civil and criminal relief have aspects that can be seen as either remedial or punitive or both: when a court imposes fines and punishments on a contemnor, it is not only vindicating its legal authority to enter the initial court order, but it is also seeking to give effect to the law's purpose of modifying the contemnor's behavior to conform to the terms required in the order.

Id. at 635.

Courts have broad discretion in choosing the means to grant such relief. *See McComb,* 336 U.S. at 193. This includes awarding attorney's fees and costs for preparing and prosecuting a contempt petition, and such fees may include factors such as overhead and support personnel. *Matter of Establishment Inspection of Microcosm,* 951 F.2d 121 (7th Cir. 1991), citing *Illinois v. Sangamo Constr. Co.,* 657 F.2d 855, 862 (7th Cir. 1981); *Squillacote v. Local 248, Meat & Allied Food Workers,* 534 F.2d 735, 748 (7th Cir. 1976).

A. The Orders of Confidentiality [10]

At issue before me are three instances where it is alleged that Mr. Messina made prohibited disclosures: in a

[10] The 1990 case was subject to both a sealing order and a protective order. The simultaneous use of a seal and a protective order is not unusual. *See e.g., Leucadia, Inc. v. Applied Extrusion Technologies, Inc.,* 998 F.2d 157, 158-59, 167 (3d Cir. 1993). While there is a definite overlap between the two types of orders in terms of the prohibition on the dissemination of content, the two are technically different, although the terms are often used interchangeably. *See* Brian T. FitzGerald, Note, Sealed v. Sealed: A Public Court System Going Secretly Private, 6 J.L. & Pol. 381, 382 n. 7 (1990) (using "confidentiality orders," "protective orders," and "sealing orders" interchangeably throughout the text).

letter, in a legal brief filed with the Seventh Circuit, and in a conversation to a New York Times reporter. That Mr. Messina made the disclosures at issue is not contested; only that the disclosures violated the orders of confidentiality and therefore are subject to sanctions for contempt.

Mr. Messina has raised several general defenses to the contempt charges regarding the disclosures at issue, both in his briefs and during his testimony at the contempt hearings. These have to do primarily with the scope and interpretation of the orders of confidentiality; the First Amendment; and the underlying validity of the orders. To

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Under Local Rule 10(C), the court "may on written motion and for good cause shown enter an order directing that one or more documents to be used in a proceeding be suppressed. . . ." A "suppressed document" is "a document or an exhibit filed in a proceeding in this Court to which access has been restricted either by a written order, including a protective order. . . ." Local Rule 10(A)(1).

A "protective order" is "an order which provides that certain documents of exhibits to be filed with the court at a future date may be filed as suppressed or sealed documents as determined by the order." Local Rule 10(A)(5).

A "sealed document," on the other hand, is "a suppressed document which the court has directed to be maintained within a sealed enclosure such that access to the document requires breaking the seal of the enclosure." Local Rule 10(A)(2). While the purpose of both orders is to ensure confidentiality, a seal order can be seen as more sweeping and inclusive if the entire case is ordered sealed. *See* FitzGerald, Sealed v. Sealed, at 382 n.7, 383 & n.10, (distinguishing as "total sealing orders" those orders that make the entire record of a proceeding confidential – the identity of the parties, all pre-trial discovery material, the contents of the pleadings, etc.).

In the present instance, there was both a protective order for documents designated as confidential and a seal on the entire case. I have therefore tried, despite their overlap in effect and purpose, to analyze the two types of orders separately. I may, however, refer to them collectively as orders of confidentiality.

give context to the cited incidents of ostensibly contemptuous conduct, and for the sake of prolepsis, I examine the scope, constitutionality, and validity of the orders before addressing the specific acts in question.

1. Scope

Mr. Messina's primary defense is his assertion that the scope of the orders of confidentiality was so limited that neither the protective order nor the seal prohibited his disclosures. According to Mr. Messina, the protective order prohibited the dissemination of very little. Mr. Messina testified that he did not understand the protective order to prohibit him from revealing the contents of pleadings. Nor from revealing confidential discovery information such as answers to interrogatories nor answers to requests to admit. Nor from disclosing the deposition testimony of witnesses. Nor from disseminating the contents of documents marked "confidential."

Mr. Messina's interpretation of the seal order is similarly cramped. Mr. Messina testified that he did not understand the seal order as preventing him from revealing the contents of depositions under seal, other discovery materials under seal, or quoting verbatim from sealed materials. The only thing that Mr. Messina believed the sealing order actually prohibited was the public disclosure of the actual pleadings – the physical documents themselves – filed in the case.

A determination of contempt requires an order of "reasonable specificity" which has been violated. *Matter of Betts,* 927 F.2d 983, 986 (7th Cir. 1991). Whether an order is reasonably specific is "a question of fact to be resolved with reference to the context in which the order is entered

and the audience to which it is addressed." *Id.,* quoting *United States v. Burstyn,* 878 F.2d 1322, 1324 (11th Cir. 1989).

Vital to the context in which the orders of confidentiality were entered was Mr. Messina's propensity to generate adverse publicity for the defendants by disclosing protected materials in order to get them to settle. I had observed this behavior firsthand over a course of almost two years in the initial *Grove Fresh* suit, No. 89 C 1113, and I watched as this familiar pattern played itself out in No. 90 C 5009. Also vital is the audience to whom the orders were addressed. *Matter of Betts,* 927 F.2d at 986. *See also United States v. Cutler,* 815 F. Supp 599 (E.D. N.Y. 1993), citing *United States v. Turner,* 812 F.2d 1552, 1565 (11th Cir. 1987). When the audience is a member of the bar, that fact will be taken into account in determining reasonable specificity, and orders that would otherwise require greater specificity for a layperson will require less for a lawyer. *See, e.g., Cutler,* 815 F. Supp. at 607; *Turner,* 812 F.2d at 1565 ("it may well be necessary that the specificity of orders directed to laypersons be greater than that of orders to lawyers").

Mr. Messina earned a bachelor of arts in social science from the State University of New York at Stonybrook in 1971. He received a J.D. from the Boston College Law School in 1975. During the academic year 1975-1976 he was a teaching fellow at the University of Illinois College of Law. From around 1976 to 1981 he was an associate at the Chicago firm of Jenner & Block. From 1981 until 1987 he was an associate and from July of 1982 to 1987 a partner in the firm of Goldberg, Kohn, Bell, Black, Rosenbloom & Ritz. Since the fall of 1987 he has been a sole practitioner. Mr. Messina is an experienced member of the

bar who had reason to be familiar in his past work with orders of confidentiality, as well as the consequences of violating those orders.

Even if Mr. Messina's past general legal experience had not given him a firm understanding about protective orders and seals, his specific experience as leading counsel in the *Grove Fresh* litigation should have filled in that gap. Mr. Messina's understanding of the application of the order is relevant to a proper determination of its scope. *Combs v. Ryan's Coal Co., Inc.*, 785 F.2d 970, 978 (11th Cir. 1986); *Duracell Inc. v. Global Imports Inc.*, 660 F. Supp. 690, 692 (S.D. N.Y. 1987).

In both *Grove Fresh* suits, Mr. Messina was warned time and again about his conduct. His repeated attempts to circumvent my orders prompted me to observe on 3 May 1991 that it was apparently Mr. Messina's intention to beat one of the defendants in this case "over the head in public with what [he] believe[d] to be wrongdoing." Any proper interpretation and application of the orders requires that they be viewed in connection not only with Mr. Messina's attorney status, but with his past violations and the warnings he experienced during the course of the *Grove Fresh* litigation.[11]

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[11] Mr. Messina repeatedly filed or attempted to file in a public manner documents that were confidential under the orders of confidentiality. *See*, e.g., Everfresh's Emergency Motion to Require Grove Fresh to File Its Motion and Reply Under Seal (filed 3 October 1990); Motion to Enforce Prior Orders of Court of Labatt and Everfresh/Canada (filed 1 May 1991); Everfresh's Motion (A) to Enforce This Court's Previous Orders; (B) To Strike and Seal Grove Fresh's Latest Pleadings; and (C) For Sanctions (filed 1 May 1991, and which contains a lengthy list of

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Moreover, given the orders' context, audience, and nature, Mr. Messina's interpretation of them is unreasonable. The prohibition of an order must be subject to reasonable interpretation, and, while a court cannot expand the terms of the order, it may look to the nature of the original proceedings to interpret and apply it. *United States v. Greyhound Corp.*, 508 F.2d 529, 532, 537 (7th Cir. 1974). Courts are not and should not be compelled to accept "twisted interpretations" or "tortured constructions" of an order. *Id.* at 532. Furthermore, a court order is issued to be obeyed. In effectuating this purpose, a court should not interpret the order in such a way as to render it a nullity. *Id.* at 533. Rather an order should be interpreted to give effect to its purpose and spirit. *See Chase Industries, Inc. v. Frommelt Industries, Inc.*, 806 F. Supp. 1381, 1386 (N.D. Iowa 1992). Mr. Messina's construction of the orders is tortured.[12] He interprets the seal as doing

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public filings contrary to explicit orders); Motion to Strike Memorandum Filed by Grove Fresh on January 15, 1993 (filed 20 January 1992, and which resulted in the Memorandum being withdrawn from the Court file by Mr. Messina's co-counsel); Petition of American Citrus Products Corporation and Henry Lang for a Rule to Show Cause Why John P. Messina Should Not Be Held in Contempt for a Violation of This Court's Sealing Order (filed 3 November 1993).

[12] To listen to Mr. Messina on the scope of the orders is to hear a veritable potpourri of tortured constructions. An example: in the course of a deposition taken 29 August 1991, Mr. Messina stated that he understood the sealing order to protect disclosure obtained during discovery: "[U]ntil we reach an agreement or agree to disagree, the depositions [including this one] are being treated as though they are protected by the seal." Later, in his own deposition, Mr. Messina interpreted the phrase "as though" as meaning "we're going to pretend that it's protected by the seal."

The game of "let's-pretend-the-deposition-was-protected-under-seal-when-it-really-isn't" is typical of Mr. Messina's methods. Not only is it

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nothing more than regulating the public's access to the physical items on file at the clerk's office. Such an interpretation would render the sealing order a nullity by allowing the public to have the words, ideas, and facts contained in protected materials, while denying them access only to the documents which contained them. The purpose of the order is not fulfilled and the conduct at which it is aimed is not curtailed if Mr. Messina's interpretation is accepted.

Moreover, Mr. Messina's interpretation is twisted. By arguing that anything not expressly prohibited by the orders may be revealed, Mr. Messina engages in the fallacy of omission: he claims that he could reveal whatever information he wanted as long as the order on its face did not expressly prohibit it; that anything omitted was allowed. This not only defies common sense, but basically denies any prophylactic effect to orders intentionally written to be broad.

The sealing order, when viewed in conjunction with the protective order, must reasonably be viewed as protecting not just documents, but the contents of those documents. The orders, after all, were intended to protect the defendants against a resolution of this case prompted by Mr. Messina's unauthorized disclosures. That interest would not be served by an interpretation and application of the orders which permitted Mr. Messina to publicly disclose any information he deemed appropriate, but

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unfair to the other players – i.e., Mr. Messina's opposing counsel – who interpret words less fancifully, but it exacerbates an insidious public stereotype of lawyers as untrustworthy manipulators of language.

restrained only his distribution of the documents containing that information.

If Mr. Messina had any doubts about exactly what he could or could not disclose, he had the continued opportunity to seek clarification. When a defendant undertakes his own interpretation of an order, and does not seek clarification, then he proceeds at his peril. Failure to seek clarification of an order, "combined with actions based upon a twisted or implausible interpretation of the order will be strong evidence of a willful violation of the decree." *Greyhound,* 508 F.2d at 532. *See Donovan v. Sureway Cleaners,* 656 F.2d 1368, 1373 (9th Cir. 1981). It follows that if one seeks clarification, gets it, and subsequently disregards it, the evidence of a willful violation is even stronger.

Mr. Messina sought clarification of the orders, and on 8 April 1994 I provided it, along with a specific procedure to be followed before any future disclosures were made: Mr. Messina was to present me with a petition setting out the information he sought to disclose, along with its independent public source.[13] In spite of my admonitions, and Mr. Messina's self-professed confusion,[14] he never once

[13] That Mr. Messina knew and understood the procedure I had outlined is evident from his testimony: "[I]f I needed or wanted to consult with prospective clients . . . what I should do is come in with a petition setting forth what it was I wanted to communicate and to identify, in the court's words, chapter and verse the public sources."

[14] Mr. Messina admitted in Court that there were times when he was "confused" about whether the seal order was intended to apply to depositions and other discovery, but this confusion evidently did not prompt him to seek further clarification. Mr. Messina claims that for the "last year or so of the case I had come to the conclusion that the –

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attempted to follow the required procedure or even consult me in a more informal manner.[15] I offered Mr. Messina unlimited opportunities to clarify the orders' scope as they related to specific disclosures but he chose not to avail himself of these.

Even if Mr. Messina's arguments were credible, I find that Mr. Messina's belief in them at the time is not. Since his interpretations of the orders are both unreasonable and unbelievable, and the result of a voluntarily-enforced ignorance, Mr. Messina is estopped from using them as a defense.

2. Constitutionality

Mr. Messina also attempts to defend his disclosures from a finding of contempt by arguing that the orders of confidentiality unduly restricted his right to free speech under the First Amendment. But even though the broad sweep of the First Amendment seems to prohibit all restraints on free expression, the Supreme Court has observed that freedom of speech "does not comprehend the right to speak on any subject at any time." *Seattle Times*

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the proper or the accurate construction of the sealing order was that it did not apply to discovery. . . . " Given that this conclusion was made in a judicial void, its basis is dubious.

[15] When asked whether he ever used that procedure during his hearing, Messina admitted he had not: "I thought about using it, and the more I thought about what would have to go into the petition, the more I thought I would only be inviting more problems rather than solving a problem." My feeling is that the problem Mr. Messina most feared he would invite by consulting me was that I would interpret the orders in ways with which he disagreed.

Co. v. Rhinehart, 467 U.S. 20, 31, 81 L. Ed. 2d 17, 104 S. Ct. 2199 (1984) (citation omitted).

In Seattle Times – the most thorough exploration yet by the Supreme Court on orders of confidentiality – it was held that when a protective order is entered on a showing of "good cause" as required by Federal Rule of Civil Procedure 26(c), is limited to the context of pretrial civil discovery, and does not restrict the dissemination of information if gained from other sources, it does not offend the First Amendment. *Id.* at 37. While the context of the case was somewhat limited, the decision's reasoning strongly suggests that Mr. Messina's First Amendment defense cannot succeed. It is necessary to parse the holding to see why.

Although the Seattle Times Court focused exclusively on protective orders issued under Rule 26,[16] it recognized that courts "have inherent equitable power to grant

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[16] Rule 26(c) allows for protective orders "on matters relating to a deposition." This has been interpreted more broadly to allow protective orders for all types of discovery materials. *See Seattle Times,* 467 U.S. at 34-37.

Under Local Rule 18(A), "discovery materials" includes "all interrogatories, requests for production and inspection, requests for admission, and responses and objections made pursuant to [specified] Federal Rules of Civil Procedure, and notices of depositions issued and depositions taken pursuant [to other specified Federal Rules].

The Seattle Times holding was specifically limited to those protective orders entered for "good cause" as required under Rule 26(c). *Id.* at 37. Whether "good cause" under Rule 26 is to be interpreted differently from whatever the necessary predicate is protective orders issued on another basis need not be decided here, since I believe the orders at issue here satisfy the Rule 26 "good cause" standard. *See infra* part A.3.

confidentiality orders, whether or not such orders are specifically authorized by procedural rules." *Id.* at 35. How broad these equitable powers are is a matter left unexplored by *Seattle Times,* but, since discovery is the focus of both Rule 26 and *Seattle Times,* there is nothing in the opinion to suggest that those equitable powers are likewise limited to protecting discovery materials. Indeed, the reverse appears to be true.

One important reason, the Court said, why "the trial court[s] have substantial latitude to fashion protective orders" is the "unique character of the discovery process." *Id.* at 36. An order "prohibiting dissemination of discovered information before trial is not the kind of classic prior restraint that requires exacting First Amendment scrutiny" because discovery materials such as pretrial depositions and interrogatories are not considered "public components of a civil trial." *Id.* at 32-33.

But the Court did not go as far as to suggest that protective orders which cover a broader variety of materials than those pertaining to discovery are constitutionally infirm. This is especially true for those materials to which access could only be gained by parties to the litigation, since there is "no First Amendment right of access to information made available only for purposes of trying his suit." *Id.* at 32. Like discovery materials, the dissemination of agreements intended by the parties to be confidential carries a "significant potential for abuse" which could "implicate privacy interests of litigants and third parties." *Id* at 34. The Court found that such rights and interests were "implicit in the broad purpose and language of the rule." *Id.* at 35 n.21.

The goal of protecting the litigants' privacy interests from abuse is as valid in the context of confidential agreements as it is for discovery. Thus, confidential agreements filed during the course of a lawsuit in reliance on an existing seal – such as confidential settlement agreements – are also worthy subjects for a protective order, because, like discovery material, they too cannot really be considered "public components of a civil trial." *See id.* at 33. *See* also *City of Hartford v. Chase,* 942 F.2d 130, 135-36 (2d Cir. 1991) (upholding district court's power to prevent access to all documents related to settlement).

And while there is "simply no legitimate public interest" to be served by disclosing settlement agreements, the parties to the agreement are likely to have "a compelling interest in keeping the settlement amount confidential." Arthur R. Miller, Confidentiality, Protective Orders, and Public Access to the Courts, 105 Harv. L. Rev. 427, 486-87 (1991). In fact, confidential settlement agreements are likely in the long run to best serve the interests of the public and the parties alike: "[W]hatever the value of disclosure, it should not obscure the strong public interest in, and policy objectives furthered by, promoting settlement." *Id.* at 486. Thus, "absent special circumstances, a court should honor confidentialities that are bargained-for elements of settlement agreements."[17] *Id.*

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[17] As Professor Miller has observed, "[a] number of courts have required a common law right of access when there has been judicial participation in the settlement process, but they have given it extremely different application." *Id.* at n.290. *Compare Minneapolis Star & Tribune Co. v. Schumacher,* 392 N.W.2d 197, 206 (Minn. 1986) (emphasizing the traditional privacy of settlements and the policy favoring settlements) *with Bank of Am. Nat'l Trust & Sav. Ass'n v.*

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The orders of confidentiality at issue here were not explicitly issued under Rule 26, but there is, and was meant to be, some overlap with Rule 26's protection of discovery materials (an express purpose behind the orders was "to facilitate discovery"). But the scope of my protective orders was meant and understood by Mr. Messina to be broader than the scope of a Rule 26 protective order,[18] covering not only discovery materials, but also other documents considered confidential, including confidential settlement agreements. Orders of such scope are within the trial court's discretion. *See Chase,* 942 F.2d at 135-36.

But for his status as Plaintiff's attorney, Mr. Messina would never have had access to the confidential settlement agreement whose terms he disclosed. He cannot shield the abuse of his insider's knowledge of the settlement amount by references to the Constitution, since orders restricting disclosure of information gained, such as here, purely from inside access to the documents implicate constitutional rights "to a far lesser extent than would restraints on dissemination of information in a different context." *Id.* at 33-34.

Mr. Messina also claims he cannot be punished for disclosing information independently available from a public source. Prohibiting the disclosure of information

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Hotel Rittenhouse Assocs., 800 F.2d 339, 345 (3d Cir. 1986) (stating that court approval of a settlement is something the public has a right to know about and evaluate).

[18] As I stated on 27 October, "one of the reasons that the sealing order was so broad was my concern that Mr. Messina would ignore any order that was not broad."

"gained through means independent of the court's processes" would raise the specter of prior restraint. *Id.* at 34. Putting aside the obvious problem of attempting to restrict information presumptively protected by the First Amendment, there are two commonsense policy reasons for not punishing someone from divulging information identical to that contained in a public source. One, it would be inherently unfair; and two, it would be too difficult, when considering sanctions for disclosure, to determine which source – public or protected – was used.

Finding Mr. Messina in contempt in this case for revealing information to which the general public had access would be both unfair and unconstitutional. But my orders certainly cannot be seen as an attempt to prevent the dissemination of public information. Aside from the implicit restraints of the First Amendment on the orders (as per *Seattle Times*), I explicitly exempted the dissemination of publicly available information from the orders' reach in clarifying for Mr. Messina the orders' scope.

However, since it was by no means self-evident exactly which information was or was not independently available from a public source,[19] I required, as part of the procedure Mr. Messina was to follow prior to making further disclosures, that he identify to this court his allegedly independent public source. Putting this burden on Mr. Messina was

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[19] Nor necessarily evident to Mr. Messina. As he himself testified, "[O]nce the case was filed . . . there was an awful lot of discovery that was redundant with information that I had gotten from public sources. But there was also discovery that provided additional information on subjects that I had gotten from public sources."

reasonable,[20] since – unlike his opposing counsel or the court itself – Mr. Messina was in the best position quickly to articulate the nature and location of his public source. Any restraints this procedure might have imposed on Mr. Messina's First Amendment rights were de minimis and ephemeral, and were substantially outweighed not only by the more compelling interests of the parties seeking confidentiality, but also by the interests of justice and judicial economy.[21]

Mr. Messina voluntarily chose not to avail himself of a procedure personally tailored to meet his needs and protect his rights. Consequently he did not identify to me

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[20] This burden is not to be confused with the threshold burden of persuasion placed on the designating party to show "good cause" for a protective order under Rule 26(c). *Leucadia, Inc. v. Applied Extrusion Technologies, Inc.*, 998 F.2d 157, 166 (3d Cir. 1993); *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986) ("Rule 26(c) places the burden of persuasion on the party seeking the protective order. To overcome the presumption, the party seeking the protective order must show good cause. . . ."), cert. denied, 484 U.S. 976, 98 L. Ed. 2d 485, 108 S. Ct. 487 (1987).

Nor is it to be confused with the burden, also borne by the designating party after a challenge to the designation, of proving that the information was appropriately subject to the confidentiality and sealing provisions in the order." 998 F.2d at 158-59. These burdens had already been surmounted to my satisfaction. Therefore this is not a *Leucadia* situation, where the district court had improperly placed the burden of persuasion on the party seeking access to sealed judicial records, rather than on the designating party, to justify continued secrecy. *See Leucadia*, 998 F.2d at 166-67.

[21] Messina argues that the outlined procedure unconstitutionally conditioned his "fundamental right to practice law." Since the practice of a [sic] law in the United States is a privilege, not a fundamental right, I do not address this argument.

any independent public sources prior to making his disclosures. Having failed to meet his burden, he is therefore estopped from raising as a defense the alternate availability of a public source.[22]

Moreover, even if Mr. Messina is correct, and some of the information he disclosed was publicly available, this will not necessarily shield him from revealing things which were not. For each of the alleged instances of contempt adequate and independent grounds exist for sanctioning Mr. Messina solely for those disclosures made without a separate public source. Specifically, disclosures concerning (1) the invocation of the Fifth Amendment privilege by certain individuals and (2) the amount of the settlement.[23] Neither piece of information, despite Mr. Messina's insistent and unsupported claims to the contrary, was independently available from a public source.

Because Mr. Messina could "disseminate the identical information covered by the protective order as long as the information [was] gained through means independent of the court's processes," *Seattle Times*, 467 U.S. at 32-33, there was no prior restraint. Mr. Messina's unauthorized disclosures of protected information not gained by independent means are therefore constitutionally valid grounds for contempt.

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[22] This is especially true for those instances where Mr. Messina claims as "public" information he himself disclosed to the public. *See infra* part B.2.

[23] These disclosures are more fully examined infra part B.

3. Validity

If the order underlying it is invalid, a contempt judgment based on a violation of that order may well fall with it. *Marrese v. American Academy* [sic] *Orthopaedic Surgeons,* 726 F.2d 1150, 1157 (7th Cir. 1984), rev'd on other grounds, 470 U.S. 373, 84 L. Ed. 2d 274, 105 S. Ct. 1327 (1985). Seeking to take advantage of this rule, Mr. Messina questions the underlying validity of the seal and the protective order as a way of preemptively neutralizing any determinations of contempt.[24] Even assuming that Mr.

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[24] Assuming for the sake of argument that my orders were invalid, Mr. Messina's reliance on Marrese to exonerate him from a judgment of contempt for their violation is problematic. This is not only because there is no single majority opinion of the en banc court, nor even because the case focused exclusively on criminal, rather than civil, contempt. My reservations about the efficacy of Marrese as it relates to Mr. Messina's defense are rooted in more fundamental concerns.

First, because as Judge Posner's opinion notes, there are many decisions which hold that a contempt citation remains intact even after invalidation of the underlying order which was violated. *Marrese,* 726 F.2d at 1157. *See* also *Howat v. Kansas,* 258 U.S. 181, 189-90, 66 L. Ed. 550, 42 S. Ct. 277 (1922); *United States v. Mine Workers,* 330 U.S. 258, 291-94, 91 L. Ed. 884, 67 S. Ct. 677 (1947); *Maness v. Meyers,* 419 U.S. 449, 458, 42 L. Ed. 2d 574, 95 S. Ct. 584 (1975); *Blocksom & Co. v. Marshall,* 582 F.2d 1122, 1124 (7th Cir. 1978).

Moreover, a more recent ruling by this court, and, unlike *Marrese,* one specifically addressed to orders of confidentiality, held that a "confidentiality order is effective until modified; the collateral bar doctrine requires litigants to obey invalid orders while they are outstanding." *Matter of Krynicki,* 983 F.2d 74, 78 (7th Cir. 1992), citing *Pasadena Bd. of Educ. v. Spangler,* 427 U.S. 424, 439-40, 49 L. Ed. 2d 599, 96 S. Ct. 2697 (1976). Even though *Krynicki* did not specifically refer to contempt, the enunciated rule would have no teeth if its violation could not be remedied through contempt sanctions. The unavoidable inference of *Krynicki* therefore is that *Marrese* does not include protective orders within its scope.

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Messina was permitted to raise the invalidity of the contempt order as a defense during his hearing rather than having to wait to do so on appeal, *see United States v. Pearce,* 792 F.2d 397, 400 (3d Cir. 1986), this defense still cannot succeed for the simple reason that the orders of confidentiality are, and were, valid. And "a continuing respect for the valid decrees of a court commands that they be obeyed until changed." *Kindred v. Duckworth,* 9 F.3d 638, 644 (7th Cir. 1993), citing *Pasadena Bd.* [sic] *Educ. v. Spangler,* 427 U.S. 424, 439-40, 49 L. Ed. 2d 599, 96 S. Ct. 2697 (1976).

A district court must independently determine if "good cause" exists before issuing a stipulated protective order. *Jepson, Inc. v. Makita Elec. Works, Ltd.,* 30 F.3d 854, 858 (7th Cir. 1994); *Leucadia, Inc. v. Applied Extrusion Technologies, Inc.,* 998 F.2d 157, 166 (3d Cir. 1993) ("To overcome the presumption [of public access], the court may

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Second, Judge Posner attempted to reconcile the apparent contradiction in the lines of precedent by noting that in those cases where the validity of the underlying order was held not to be reviewable on appeal from the judgment of contempt, the order could have been appealed as of right directly, or otherwise reviewed other than by appeal from the contempt judgment. *Marrese,* 726 F.2d at 1157. Discovery orders, like the one at issue in *Marrese,* are not appealable. *Id.* But not only are orders of confidentiality appealable independent of any contempt judgment, the orders in this very case were actually appealed to the Seventh Circuit. *See Grove Fresh Distributors, Inc. v. Everfresh Juice Co.,* 24 F.3d 893, 898-99 (7th Cir. 1994). Thus, the orders at issue here fall outside the *Marrese* rule, and even a finding that the underlying order was invalid would not shield Mr. Messina from being found in contempt for its violation. *See Maness,* 419 U.S. at 458 ("Persons who make private determinations of the law and refuse to obey an order generally risk criminal contempt even if the order is ultimately ruled incorrect.").

construct a broad 'umbrella' protective order upon a threshold showing by one party (the movant) of good cause.") (citation and internal quotation marks omitted). In considering whether good cause exists for a protective order, the federal courts have generally adopted a balancing process.[25] *Pansy v. Borough of Stroudsburg,* 23 F.3d 772, 787 (3d Cir. 1994), citing Miller, *Confidentiality,* 105 Harv. L. Rev. at 432-33. When a district court carefully considers "each of the factors which favor[ ] access or continued secrecy for the documents at issue" and assigns "appropriate weights to the various interests," there is no abuse of discretion. *Leucadia,* 998 F.2d at 167, citing *Littlejohn v. BIC Corp.,* 851 F.2d 673, 685 (3d Cir. 1988).

In deciding to seal a case, a district court should articulate the findings and reasoning that served as a basis for the seal. *Grove Fresh Distributors, Inc. v.*

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[25] The Third Circuit recently has summarized a non-exhaustive list of factors to be considered in the balancing process. These include (1) whether parties have an interest in privacy; (2) whether information is being sought for legitimate purpose or for improper purpose; (3) whether there is a threat of serious embarrassment to a party; (4) whether information is important to public health and safety; (5) whether sharing of information among litigants would promote fairness and efficiency; (6) whether a party benefiting from the confidentiality order is a public entity or official; and (7) whether the case involves issues important to the public. *Pansy,* 23 F.3d at 787-88. As the record in the instant case shows, I felt that any presumptive right of access possibly merited by (4) was substantially outweighed by (1), (2), and, to some extent, (3). Although information concerning public health and safety was implicated – this being a case involving the adulteration of orange juice – I was not convinced by the evidence before me at that time that (4) merited greater weight. Factor (7) overlapped with (4), and the two were considered together. Factors (5) and (6) were not relevant in this case, and were therefore not considered in my balancing of the interests.

Everfresh Juice Co., 24 F.3d 893, 898 (7th Cir. 1994). But, since an absence of those findings and reasoning in the record is not necessarily evidence that a court never considered good cause, the real question is whether or not there was any substantive decision behind the record's "silence."

If the lack of articulated findings stems from a complete failure to make a good cause determination, the order is likely to be found invalid. *See Jepson*, 30 F.3d at 859. The consequence of that would be the reversal of any sanctions imposed for violating the order now adjudged to be invalid. *See id.* In *Jepson*, the Seventh Circuit reversed the district court's imposition of sanctions against counsel for disclosing information subject to a stipulated protective order because it determined that the underlying order was invalid. *Id.* at 858-60. The Court was not only disturbed by the lack of any implicit or explicit reference to "good cause" in the order itself, but also by the fact that no specific finding of this appeared anywhere in the record. *Id.* at 859.

Reversal in *Jepson* was appropriate because there was "*no* indication that the magistrate judge made some independent determination that 'good cause' existed before issuing its [protective order]." *Id.* at 858-59 (emphasis added). But while the rationale for sealing cases should ideally be put on the record at the time of the sealing, the Seventh Circuit has "yet to hold that where such a description is [initially] lacking, reversal is per se appropriate." *Grove Fresh*, 24 F.3d at 898.

The Court of Appeals will independently determine if good cause existed only if the lower court obviously did not. *See Jepson*, 30 F.3d at 859. *See* also *Leucadia*, 998

F.2d at 167 ("The required balancing should be done in the first instance by the district court"). In this circuit, the preferred method to see whether good cause was determined (if not recorded) is to remand the matter back to the authorizing court. *See Grove Fresh,* 24 F.3d at 898. If on remand the district court can specify the basis for its sealing order, the order cannot be invalidated – and the sanctions for violating the order reversed – for a complete failure to decide good cause. *See Jepson,* 30 F.3d at 860. Moreover, the Court of Appeals will then have findings specific enough to "determine whether the closure order was properly entered." *Grove Fresh,* 24 F.3d at 898, quoting *Press-Enterprise Co. v. Superior Court,* 464 U.S. 501, 510, 78 L. Ed. 2d 629, 104 S. Ct. 819 (1985).

The court in Jepson was dealing with a stipulated protective order that was never submitted to the district court, never signed by it, and never entered. 30 F.3d at 856-57. How much weight this played in the Seventh Circuit's reasoning is unclear,[26] but from the opinion this fact was considered. 30 F.3d at 856. Here, of course, the stipulated protective order at issue was submitted to me, I

[26] Unclear partly because there were two protective orders at issue in the case: a stipulated protective order that the district court never saw and an interim protective order that was signed by the magistrate judge without considering good cause. *See Jepson, Inc.,* 30 F.3d at 856. Judge Kanne's analysis does not always distinguish between the two. *See id.* at 859. Perhaps this is because the orders overlapped to a certain extent, *id.* at 856, and perhaps because the attorney was sanctioned pursuant to a Motion for Enforcement of Protective Orders [plural] and for Sanctions. *Id.* at 857 (emphasis added). As both orders were involved, and as their purposes overlapped, the Court may have felt it expedient to treat them for purposes of analysis as interchangeable.

did sign it, and it was entered. And although I never actually used the phrase "good cause" to justify my reasons for signing it, the record amply attests to an independent determination of good cause, including a balancing of interests, which justified the seal as well as the protective order.[27]

Given the purpose for the orders, the context in which they were issued, and the balancing of the respective interests, the orders are valid: there was good cause to find good cause. However, even assuming that the orders were invalid, Mr. Messina may still be punished for violating them. *Krynicki,* 983 F.2d at 74 (holding litigants must obey even invalid outstanding orders of confidentiality). Any alleged invalidity of the underlying orders would not affect the validity of a contempt judgment for their violation.

B. Violations of the Orders of Confidentiality

1. Disclosures in Appellate Brief

The first charge of contempt against Mr. Messina stems from a forty-two page brief he filed with the Seventh Circuit Court of Appeals on 22 October 1993.[28] Within the

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[27] Ironically, I elaborated on my reasons for issuing the orders one month prior to the Seventh Circuit's request that I "specify the basis" for the seal.

[28] At the time of filing, Mr. Messina was neither a party, nor an attorney for any party, in the *Grove Fresh* litigation. The Seventh Circuit struck the motion as frivolous, and asked him to show cause why he should not be sanctioned for improper conduct. Sanctions against Mr. Messina for mischaracterizing his attorney status and his standing are discussed infra part D.

brief, defendants American Citrus and John Labatt allege, Mr. Messina disclosed protected information that was not available from public sources and which could only have come from the discovery process in the case.

Specifically, Messina is charged with having asserted that certain defendants, or representatives of defendants, invoked the Fifth Amendment privilege against self incrimination. Moreover, it is alleged that Messina mischaracterized the record by asserting that other individuals had invoked the Fifth Amendment (and stating that adverse inferences should thereby be drawn against the corporate defendants) when in fact they had not, thus making Messina's disclosures to the Seventh Circuit deceptive as well as improper.

A perusal of the brief in question shows the above charges to be true: the disclosures about the Fifth Amendment were made, the disclosures were improper because the disseminated information was protected by both the seal and the protective order, the information was unavailable from any independent public source, and inaccuracies in that which was divulged distorted the record. Mr. Messina's revelations are all the more egregious for having been made with full knowledge – as he admitted under cross-examination – that at the time he made his disclosures I then had before me a motion in support of keeping under seal the very issues he disclosed.

The orders in this case were entered lawfully and were reasonably specific. Mr. Messina violated those orders, and the violation of those orders was willful. There are no valid defenses to his actions. The evidence of Mr. Messina's violation of the orders here is more than clear and convincing, it is beyond a reasonable doubt. Since the

elements and the standard of criminal contempt are met, and since what will satisfy the stricter criminal contempt standards will necessarily satisfy its civil counterpart, the same acts by Mr. Messina may yield sanctions for both criminal and civil contempt.

For this first instance of civil contempt, I order Mr. Messina to compensate the parties for losses they can prove resulted from noncompliance, including attorney's fees and costs incurred in preparing and prosecuting Mr. Messina for contempt (this may include overhead and support personnel). The defendants shall submit for review the total amount of this compensation within two weeks from the date of this opinion.

And for this first instance of Mr. Messina's criminal contempt, which not only subverted the authority of the court, but also wasted its time (and therefore the taxpayers money), I fine him $1000. This amount, which is meant to compensate the government as well as to punish Mr. Messina's disobedience, is due within three days after the issuance of this opinion, and shall be paid by a certified check made out to "the United States of America."

2. Disclosures in Letter

The second contempt charge against Mr. Messina stems from a letter, dated 20 September 1994, written by Mr. Messina to John Elson, of the Northwestern University Legal Clinic, counsel for the Ad Hoc Coalition of In Depth Journalists, an intervenor. In this letter, defendants claim, Mr. Messina disclosed – and substantially mischaracterized – information obtained from discovery, and quoted verbatim from the sealed complaint.

Instead of consulting with me, as he was advised to do before making further disclosures, Mr. Messina – perhaps attempting to save this court the time and trouble of deciding the matter for itself – decided the legal issues on his own. Thus he begins his letter by unequivocally stating that the designations about materials to remain under seal are "not well grounded in fact," and that "[a]fter careful review of the applicable law and the procedural history of the seal in the Labatt case, I have concluded that I am free to provide you with [the] information . . . set out below." And provide it he did.

At page 4, arguing that the settlement terms were no longer confidential and therefore did not justify closing the post-settlement proceedings, Mr. Messina disclosed the confidential settlement amount, which was part of the sealed record.[29] In doing so, he violated not only the orders of confidentiality, but also prejudiced the interests of his client by knowingly and willfully violating the terms of the confidential settlement agreement itself.[30]

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[29] These disclosures were justified, Mr. Messina argues, because this information was "public." But he eventually (and reluctantly) admitted under cross-examination that the information was public only because of disclosures he made in his motion to the Seventh Circuit: "The information about the settlement amount [as published in national press] certainly came from my papers."

Thus, Mr. Messina attempts to defend his actions by claiming as "public" protected information he himself disseminated to the public. The circularity of his argument is audacious, even by his own standards of audacity.

[30] Under cross-examination Mr. Messina admitted he understood that the settlement agreement between the defendants and Grove Fresh contained confidentiality provisions, that one of the terms that was to remain confidential was the amount of the settlement, and that

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At pages 6 through 8, arguing that American Citrus' objection to certain designations were groundless,[31] Mr. Messina revealed potentially disparaging and scandalous designations contained in the sealed complaint. Messina admitted under cross-examination that at the time he disclosed this information he knew that keeping those particular designations under seal was then an issue before me awaiting decision.

Also at page 6, Mr. Messina revealed that certain individuals had invoked the Fifth Amendment privilege against self-incrimination. This information was exclusively contained in discovery materials covered by the seal and the protective order.[32]

At page 7 of his letter Messina quoted paragraphs 99, 100, and 102 of the complaint, which was then under seal. The quotes were verbatim.

At page 8, arguing that American Citrus' objection to the naming of non-party co-conspirators was groundless, Messina disclosed the identity of eight individuals named

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the amount was defined as one of the material terms to remain confidential. He also admitted he knew that the defendants did not want the information disclosed, that confidentiality is valuable, and that he understood the value of confidentiality in an agreement.

[31] These designations, which plausibly had negative connotations, referred to the adulterated orange juice formula and the organization which utilized it.

[32] Mr. Messina tries to claim that this information was unrelated to discovery, since it was supposedly information contained in a letter from one of the defendant's attorneys. But after much waffling, he finally admitted under cross-examination that the letter was only written in response to a deposition notice issued by Grove Fresh. Such a response was unquestionably related to discovery.

in the sealed complaint who he alleged were co-conspirators. He did this even though, as he admitted under cross-examination, he knew that the identification of these individuals – and the issue of whether this information should be made public – was the subject of a brief before me, for which the parties were presently awaiting a judgment.

Again, I find that Mr. Messina willfully violated reasonably specific orders beyond a reasonable doubt. Again, there are no valid defenses to Mr. Messina's action. Again, both civil and criminal contempt sanctions are appropriate. These sanctions, for this second instance of contempt, are identical to those previously cited: compensation for the parties' losses and a fine exacted on behalf of the United States.

3. Disclosures in Conversation

The third alleged instance of contempt springs from Mr. Messina's disclosure of protected information to a reporter for a national publication, resulting in a front page story revealing the contents of his disclosures. *See* Diana B. Henriquez, 10% of Fruit Juice Sold in U.S. Is Not All Juice, Regulators Say, N.Y. Times, Oct. 31, 1993, at A1.

Messina admitted in deposition that he had a private conversation with Diana Henriquez, the article's author, in which he divulged that certain named individuals had invoked the Fifth Amendment privilege. At the time he made his disclosures, that information was exclusively available from nonpublic, protected discovery materials. Moreover, Mr. Messina testified that he directed Ms. Henriquez to his recently filed Seventh Circuit brief, where the newly "public" information about the settlement

amount was immediately discoverable. This amount appeared in the story. *Id.* at A11.

Once again, I find that Mr. Messina willfully violated reasonably specific orders beyond a reasonable doubt; that no valid defenses exist to his actions; and that both civil and criminal contempt sanctions are appropriate. The sanctions for this third instance of contempt are identical to, but separate from, those mentioned previously.

4. Future Disclosures

Two recent instances of Mr. Messina's behavior make me question whether Mr. Messina has the necessary self restraint to curb his seemingly uncontrollable propensity to disclose protected materials. The first concerns a "press release" which Mr. Messina drafted, sent to the defendants on 24 January 1995, and threatened to disseminate on 27 January 1995. Headlined "Orange Juice Companies Seek to Punish Lawyer Who Uncovered Consumer Fraud," this "press release" disclosed the invocations of the Fifth Amendment privilege, as well as substantial (and often inaccurate) information about the settlement negotiations, including disclosures of communications with the Court, and with Mr. Messina's former client and co-counsel.

Whether Mr. Messina's methods are seen as tough negotiation or blackmail, his bad faith is evidenced by his threat to send his "press release" not only to the press, but to the Plaintiff's Bar as well. (Although he denied this particular audience was chosen to raise the specter of additional lawsuits against the defendants, he was unconvincing.) Mr. Messina evidently had no compunctions about coercing compliance with his demands by threatening the disclosure of protected information. And there is no

question that he would have followed through with his threat: under cross-examination, Mr. Messina admitted that, absent compliance or a court order, "the press release would have been issued."

As disturbing as is Mr. Messina's willingness to hurt his perceived enemies, it pales beside his willingness to run roughshod over the best interests of his client. This incident prompted the sad spectacle of Mr. Messina's former client, Grove Fresh, filing a motion to preclude him from filing his "press release." Perhaps Mr. Messina felt no loyalty to Grove Fresh since he had been "relieved" of his assignment, but no client – present or former – should be treated the way Mr. Messina treated Grove Fresh. Had he been class counsel, I would have afforded him no fees, because he was seemingly incapable of placing his client's interests above his own.

The second recent incident which makes me question Mr. Messina's ability to restrain himself from future violations concerns his recent spate of filings – nine documents filed between 9 March and 27 April 1995 – with the Seventh Circuit. Seemingly impervious to the fact that among the questions currently before this court (indeed the subject of part of this opinion) are Mr. Messina's previous disclosures in an appellate brief of the confidential settlement amount, Mr. Messina, in his latest publicly-filed Seventh Circuit briefs, once again blithely discloses the confidential settlement amount. *See, e.g.*, John Messina's Motion to Consolidate Appeals and Briefing Schedules at 3 (filed 24 April 1995).

These latest happenings prompt more than a sense of deja vu. Such a shamelessly willful subversion of this court's authority and business, performed with such

reckless abandon, engenders the two feelings which Aristotle believed created the catharsis which accompanied great tragedy: fear and pity. *See Poetics* at 230. Fear that Mr. Messina will continue to disregard this court's express orders, and pity that in doing so he teeters so precariously on the abyss.

To save the *Grove Fresh* defendants from a significant risk of repetition of future disclosures (which from the evidence is clear and convincing), and perhaps to save Mr. Messina from himself, I require Mr. Messina to post a $50,000 bond for the next five years. Perhaps the forfeiture of this amount for future violations will give Mr. Messina something his tragic cousin Hamlet had in abundance: pause.

C. Failure to Appear

The fourth contempt charge against Mr. Messina stems from his failure to show up in court, as ordered, on 21 October 1993. The circumstances behind the nonappearance are as follows:

On 20 August 1993, Everfresh filed a Motion to Enforce Settlement Or Relief From Judgment. When the motion was initially called, Mr. Messina did not appear. The Court ordered that either Mr. Messina or his legal representative appear in response to the motion when next heard, which was set to be 1 September 1993. As he acknowledged in both his deposition and hearing testimony, Mr. Messina was expressly advised of this order.

The matter was then put over at the request of Mr. Messina's lawyer. By letter dated October 5, 1993, Mr. Messina was informed that the Court would not be in

session until 18 October 1993, but that the Everfresh motion would be called shortly thereafter. This was the same motion for which Mr. Messina had earlier failed to appear, and for which the court had ordered his appearance.

On 12 October 1994, Mr. Messina received formal notice that the Everfresh motion had been re-noticed to be heard on 21 October 1993. Mr. Messina admitted in court it was served on him and that he knew the re-noticed motion was the same as that for which he was ordered to appear on 1 September 1993.

On the evening of 20 October, Mr. Messina decided he would not appear as ordered. Shortly after 6 a.m. on the morning of 21 October Mr. Messina faxed a letter to counsel for defendants "as a courtesy to let you know that I do not plan to attend the hearing which you have noticed [today]." (A similar courtesy was not extended to the court, which was given no advance notice of his planned absence.) In response, Mr. Messina received a letter reminding him of his obligation to appear as ordered. Although again put on notice that his appearance was required, Mr. Messina failed to show up.

An order requiring a court appearance will flunk the "reasonable specificity" requirement for a contempt finding if the language of the order leaves any doubt or uncertainty that an appearance is required. *See Matter of Betts,* 927 F.2d 983, 987 (7th Cir. 1991). If a court order is ambiguous, it precludes the essential finding in a criminal contempt proceeding of willfulness. *Id.* In *Betts,* the criminal contempt conviction was reversed because the docket order did not state that an appearance was "de rigueur." *Id.* at 988.

Mr. Messina's excuses for his nonappearance are many and varied.[33] Given the evidence, few of them are plausible, many are disingenuous, and several are flatly contradicted by the chronology. None of them provides Mr. Messina with any real defense. After watching him testify, and after reviewing the record, I am convinced beyond any doubt that Mr. Messina had proper notice, fully understood his appearance was required, and knew the reasonable consequences of his actions.

I find not only that Mr. Messina's choice not to appear was willful, but that it was made in bad faith. The evidence convincingly suggests Mr. Messina's nonappearance was motivated by a desire to prevent an order of this court: specifically, that he avoided the hearing so this court could not stop him from filing in the Seventh Circuit a brief on which he had been working for several weeks. On the day he was scheduled to appear, Mr. Messina instead had his affidavit for the brief notarized. On the following

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[33] His first excuse is that because he never actually received an order signed by the judge requiring him to appear, he was not obliged to attend. (This conclusion was based on his status as "an attorney with about 17 years of experience at the Bar.") Mr. Messina's second excuse is that he discovered at the eleventh hour that his attorney could not appear on his behalf, and he did not think it "wise to appear without counsel."

Excuses three and four are found in his letter of 21 October 1993, sent the day he was due to appear. The third excuse is that the court did not have jurisdiction over him. The fourth is that the motion was not well-grounded in fact, and therefore he [sic] not have to appear in what he assumed was a voluntary mediation process. The fifth is that the bare bones 60(b) motion did not make "a serious effort to plead fraud," and, since the court would only be involved as a mediator, he "respectfully decline[d] to participate voluntarily in any mediation process."

day, he filed the brief itself. I do not find the timing of all these events coincidental.

I find yet again that Mr. Messina willfully violated reasonably specific orders beyond a reasonable doubt; that no valid defenses exist to his actions; and that both civil and criminal contempt sanctions are appropriate. The sanctions for this instance of contempt is [sic] identical to, but separate from, those mentioned at the end of parts B.1-B.3: compensation to the defendants and a fine payable to "the United States of America."

D. Misrepresenting Attorney Status and Standing to Seventh Circuit

The fifth charge against Mr. Messina, which stems from the motion Messina filed with the Seventh Circuit Court of Appeals on 22 October 1993, potentially carries sanctions not for contempt but for violations of Rule 11 of the Federal Rules of Civil Procedure.[34] Defendants charge that Mr. Messina made material misrepresentations to the Court, fudging his status as an attorney in the Grove Fresh litigation in order to claim standing to make a personal motion.

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[34] Rule 11 applies to "[e]very pleading, written motion, and *other paper* "signed by the attorney. Fed. R. Civ. P 11(a) (emphasis added). Briefs submitted to the Courts of Appeals, as well as those filed in district court, come within the scope of Rule 11, since the term "other paper" in Rule 11 "includes notices of appeal and appellate briefs. . . . " *Thornton v. Wahl,* 787 F.2d 1151, 1153 (7th Cir. 1986), cert. denied, 479 U.S. 851, 93 L. Ed. 2d 116, 107 S. Ct. 181 (1986) Thus, Rule 11 applies to the certifications made by Mr. Messina in his appellate brief.

The relevant chronology is as follows:

> On 21 January 1993, the president of Grove Fresh wrote a letter to Mr. Messina informing him that he was "hereby relieved of all responsibility in the handling of this matter [the Grove Fresh litigation]. [Two other attorneys] will act as our sole attorneys and trial lawyers."

Then, on 22 October 1993, nine months after being discharged by his client, Mr. Messina filed a motion with the Seventh Circuit asking for a hearing to respond to allegations about him in defendants' brief. Mr. Messina didn't file any type of motion to intervene in the case or move for leave to file a motion regarding allegations of misconduct, but instead proceeded to file his motion on the theory that he had standing. In paragraph 1 of his motion in the Court of Appeals, Mr. Messina stated:

> Petitioner [Messina] is one of the attorney's of record for plaintiff, Grove Fresh Distributer's, Inc. Moreover, in both the motion itself and in the accompanying affidavit, Mr. Messina refers to himself as "the Grove Fresh attorney" or "Grove Fresh's attorney," and to Grove Fresh as "his client." Nowhere in either document did he mention being relieved of all responsibility for the Grove Fresh litigation.

On 28 October 1993, in response to a motion by Mr. Messina that was before me, Grove Fresh sought to distance itself from its former counsel's actions:

> Grove Fresh Distributer, Inc. (Grove Fresh) did not authorize the filing of [Mr. Messina's motion]. Nor was the motion made on behalf of Grove Fresh. Mr. Messina was discharged as Grove Fresh's attorney on January 21, 1993. Although

> Mr. Messina has apparently not withdrawn his appearances in these cases, Mr. Messina has not been authorized to act on behalf of Grove Fresh since his discharge.
>
> Even after Grove Fresh went on record disavowing a connection with him, Mr. Messina failed to either seek leave to withdraw as attorney of record or to amend his brief so that his stated attorney status more accurately conformed to his ex-client's conception of their relationship.

In an order dated 9 November 1993, the Seventh Circuit denied Messina's motion and granted motions by American Citrus, Labatt, and Everfresh to strike certain documents. The Court also asked Messina to show cause, pursuant to Federal Rule of Appellate Procedure 46(c), as to why he should not be sanctioned for filing a frivolous motion.

On 15 November 1993, American Citrus filed a motion in the Seventh Circuit for disciplinary action against Messina for misrepresenting his attorney status. The Court of Appeals, in an order dated 14 December 1993, denied this motion because "the relief requested is appropriately sought in the district court."[35]

Finally, on 21 January 1994, American Citrus and Labatt filed a joint memorandum in support of sanctions against Messina for, among other things, his misrepresentations to the Court of Appeals. The defendants pray for

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[35] The Court of Appeals may have wished only that I make the findings of fact which would have allowed it to sanction Mr. Messina on its own, under Fed. R. App. P. 38. If this is the case, the Court may, of course, vacate my disposition of the matter and substitute its own.

the court to impose appropriate monetary sanctions for Mr. Messina's misrepresentations.

Rule 11 requires that all pleadings and motions of a party represented by an attorney be signed by that attorney, certifying

> that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact . . . warranted by existing law . . . [and] not interposed for any improper purpose . . . .

Fed. R. Civ. P. 11(b); *Goka v. Bobbitt,* 862 F.2d 646, 650 (7th Cir. 1988). It also provides that appropriate sanctions "shall be imposed if its provisions are violated." *Goka v. Bobbitt,* 862 F.2d at 650. The district courts are "best acquainted with the local bar's litigation practices and thus best situated to determine when a sanction is warranted to serve Rule 11's goal of specific and general deterrence." *Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384, 404, 110 L. Ed. 2d 359, 110 S. Ct. 2447 (1990).

Mr. Messina violated Rule 11 in three ways, each of which would be independently sanctionable. First, because the recitation of his attorney status was not well grounded in fact. It would be reasonable, from Mr. Messina's representations in his brief and supporting affidavit, to infer that at the time of filing he was Grove Fresh's attorney in the Grove Fresh litigation. Reasonable, given what Mr. Messina says, but incorrect, given the material facts he omits.

Mr. Messina states in the first paragraph of the brief that he "is one of the attorney's of record for plaintiff, Grove Fresh Distributer's, Inc." Local Rule 3.15 states that "[o]nce an attorney has filed an appearance form pursuant

to General Rule 3.14 he/she is the attorney of record for the party represented for all purposes incident to the proceeding in which the appearance was filed." Moreover, "the attorney of record may not withdraw . . . without first obtaining leave of the court." *Id.* An attorney who does not request and obtain leave to withdraw is still considered the attorney of record. *See Daniels v. Brennan,* 887 F.2d 783, 784-85 (7th Cir. 1989). Thus, Mr. Messina's statement that he "is an attorney of record" is technically true.

But even if technically true, the placement of this statement (the first paragraph) and the use of the present tense ("is") implies a connection with both case and client that Mr. Messina no longer enjoyed. The misleading illusion that Mr. Messina was then currently representing Grove Fresh is perpetuated by Mr. Messina's numerous references – in both the brief and his supporting affidavit – to himself as "Grove Fresh's attorney" and Grove Fresh as "his client."

To make the illusion complete, Mr. Messina omits anything that might possibly contradict it. This silence is as misleading as anything that Mr. Messina says. Nowhere in the documents filed by Mr. Messina with the Seventh Circuit, including his forty-two page brief and thirteen page affidavit, does Mr. Messina mention the material fact that he was no longer Grove Fresh's attorney, was no longer working on the case, and had been discharged by Grove Fresh nine months earlier. Mr. Messina splits many linguistic hairs to exonerate himself, claiming that he did not consider himself to have been "discharged," merely "relieved of all responsibilities." Such distinctions are worse than implausible: they are insulting.

Mr. Messina claims he was simply trying to identify his relationship to the matter. But since he admitted he was acting on his own behalf, and filing on his own behalf, and the brief concerned not Grove Fresh but him personally, troubling questions arise: Why did he feel the need to describe his past relationship with a former client? And if he felt the need to do so, why not disclose he had been discharged – or relieved – by Grove Fresh? Given Mr. Messina's inclination for disclosing information I find it revealing – and not accidental – that he chose this particular occasion to be silent.

Having watched an evasive Mr. Messina under cross-examination waffle over his reasons for omitting the obvious, I cannot choose but to disbelieve them. Not just because of his long experience as a lawyer, and his demonstrated sensitivity to how false impressions may be fostered by relevant omissions,[36] but also because he admitted that for the purposes of the existing Grove Fresh litigation – and his appeal – he understood he was no longer a Grove Fresh lawyer, yet chose not to amend or withdraw as attorney of record after Grove Fresh voiced its objections.

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[36] For example, in the very appellate brief in question, Mr. Messina argues that the defendants, in a Seventh Circuit brief of their own, wrongfully accused him of professional misconduct through "false statements and innuendoes created by the omission of relevant and material facts." Mr. Messina makes much of what the defendants "failed to disclose" and "falsely imply," and he goes into some detail over their alleged use of "misleading half-truth[s] to create [a certain] impression." Mr. Messina's evident awareness of the potential of language to mislead makes his own silences all the more suspicious, and his attempts to hold others to a standard which he himself did not follow all the more reprehensible.

Mr. Messina's (implied) attorney status, therefore, is not well-grounded in fact for Rule 11 purposes.

Second, Mr. Messina violated Rule 11 because he certified the matter was filed with a proper purpose when it was not. Mr. Messina's purpose in mischaracterizing his status was improper: to piggyback his personal appeal onto the Grove Fresh suit to obtain a semblance of personal standing. Mr. Messina's long experience as a lawyer, if not the reasonable inquiry required by Rule 11, should have alerted him not only to the impropriety of appealing a personal matter without personal standing, but of filing an appeal before the issues had been properly placed before the district court. I find his protestations to the contrary are as disingenuous as the means by which he chose to approach the Court of Appeals.

Third, Mr. Messina violated Rule 11 because the filing of his brief was not warranted by existing law. It was, in fact, precluded by it. A person who brings an appeal must have standing to do so. *Moy v. Cowen,* 958 F.2d 168, 170 (7th Cir. 1992). It is a well-settled rule that "only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment." *Marino v. Ortiz,* 484 U.S. 301, 304, 98 L. Ed. 2d 629, 108 S. Ct. 586 (1988). In most cases, this means parties of record at the time the judgment was entered, including those who have become parties by intervention, substitution or third-party practice. *In re VMS Ltd. Partnership Sec. Litig.,* 976 F.2d 362, 366 (7th Cir. 1992). *But see In re Proceedings Before Federal Grand Jury,* 643 F.2d 641, 643 (9th Cir. 1981). Moreover, Local Rule 43 maintains

> no pleading, motion, or other document shall be filed in any case by any person who is not a party

> thereto, except by leave of Court first had and obtained . . . .

Mr. Messina was not a party to the action, did not then represent a party to the action, and had no adverse judgment to appeal.[37] A reasonable inquiry into the law would have shown Mr. Messina that he had no standing to appeal. There was no reasonable basis for his believing otherwise. After listening to Mr. Messina, and sifting through the record, I believe he filed not inadvertently or by mistake, but with the intent to deceive the Seventh Circuit into believing he had standing when he knew in fact he did not.

Since Mr. Messina's brief was not well grounded in fact, was certified for an improper purpose, and was unwarranted by existing law, I find he violated Rule 11. I therefore fine Mr. Messina $1000, and require him to compensate the *Grove Fresh* defendants for any expenses incurred in addressing the Seventh Circuit filing.[38]

Summary

To sum up, I find Mr. Messina in contempt of this court for his actions in four separate instances. For his

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[37] Mr. Messina's "appeal" was really a request for an evidentiary hearing and a declaration that a consulting agreement he signed was void.

[38] Although I am sanctioning Mr. Messina under Rule 11, Rule 11 "is not the exclusive source for control of improper presentations of claims, defenses, or contentions." Fed.R.Civ.P. 11 advisory committee's notes, 1993 amendment. My analysis would also support sanctions under the court's inherent powers or under 28 U.S.C. § 1927, and I summon both as alternate authority for the sanctions.

acts of civil contempt, Mr. Messina is ordered to compensate the parties for losses resulting from his noncompliance, including attorney's fees and costs incurred in preparing and prosecuting Mr. Messina for contempt (this may include overhead and support personnel). The defendants shall submit to me for review the total of these compensatory fines within two weeks from the date of this opinion.

For each of his four acts of criminal contempt, Mr. Messina is ordered to pay $1000 to "the United States of America."

Since there is a significant risk of repetition of Mr. Messina's disobedience of court orders, I require Mr. Messina to post a $50,000 bond for the next five years, with the admonition that any future disclosures – made without first consulting me and proving an independent public source – will lead to forfeiture of this amount, if not further sanctions.

Finally, for his violations of Rule 11, I fine Mr. Messina $1000, and require him to compensate the other side for the costs they have incurred.

Conclusion

In tragedy, the denouement "should arise out of the plot itself. . . . " *Poetics* at 242. And so it does here: the sanctions imposed by this court on Mr. Messina arise naturally from his own errors of judgment. Like the ultimate fate of the great figures of literature, the spectacle of an experienced attorney brought so low by his own actions serves as a cautionary tale to others, and inspires

the cathartic emotions of fear and pity recognized by Aristotle as the hallmarks of tragedy.

Enter:

James B. Zagel

United States District Judge

Date: 9 June 1995

FOR THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GROVE FRESH DISTRIBUTORS, INC., an Illinois corporation,	) No. 90 C 5009) Judge Zagel
Plaintiff,	) Filed Under Seal) Pursuant to Court Order
v.	)
JOHN LABATT LIMITED, a Canadian corporation; et al.,	)
Defendants.	)

MINUTE ORDER DATED JULY 11, 1995

Motion (260-1) for a new trial or to amend the judgment is granted in part and denied in part. Those portions of the Memorandum Opinion and Order of 9 June 1995 which impose criminal sanctions of $4,000.00 are vacated. The request for a new trial is denied. Matters relating to criminal contempt are referred to the United States Attorney's Office for investigation and possible prosecution.

[Additional statement on reverse of Minute Order.]

In my Memorandum Opinion and Order of 9 June 1995, I found John Messina guilty of four separate acts constituting both civil and criminal contempt. I ordered him to pay $1000 to "the United States of America" for each of his four acts of criminal contempt. Mr. Messina now moves this court for a new trial, or, alternatively, to amend the judgment by vacating the criminal penalties entered against him.

In *International Union, United Mine Workers of America v. Bagwell*, 114 S.Ct. 2552 (1994), the Supreme Court examined "the somewhat elusive distribution between civil and criminal contempt fines" and instructed us that courts "still may impose noncompensatory, petty fines for contempt" without conducting a jury trial. *Id.* at 2563. Mr. Messina's actions, and the sanctions he received, do not fall into the categories of cases which the Court suggests require heightened criminal procedural protections: (1) "serious criminal contempts involving imprisonment of more than six months; (2) "serious" fines (i.e., $52 million); and (3) indirect contempts involving widespread, ongoing out-of-court disobedience to complex injunctions. *Id.* at 2556-63.

The only valid point raised by Mr. Messina concerns the issue of notice. Mr. Messina correctly maintains that sanctions for criminal contempt can never be imposed if the contemnor was not given notice that he was specifically charged with criminal contempt. Fed.R.Crim.P. 42(b) ("The notice shall . . . state the essential facts constituting the criminal contempt *and describe it as such.*") (emphasis added); *Pabst Brewing Co. v. Brewery Workers Local Union No. 77, AFL-CIO*, 555 F.2d 146, 151 (7th Cir. 1977).

My remarks prior to the hearing – ("it is my view that whatever sanctions there [are] are likely to be civil") – may have lead Mr. Messina and the other attorneys involved to reasonably believe that criminal contempt was not at issue in the hearing. If this is the case, then Mr. Messina did not get the specific notice to which Fed.R.Crim.P. 42(b) entitles him, and the criminal contempt sanctions imposed against Mr. Messina cannot be allowed to stand.

I therefore vacate those portions of my opinion of 9 June 1995 which impose criminal penalties. Left unaffected by this amendment of the judgment are the civil penalties earned by Mr. Messina – which are independent of, and severable from, any criminal sanctions – as well as all findings of fact.

Mr. Messina is not totally off the hook, however. I still believe that criminal contempt sanctions against Mr. Messina are an appropriate way to vindicate his flouting of the court's authority. I therefore refer the matter to the United States Attorney's Office for investigation and possible prosecution.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GROVE FRESH DISTRIBUTORS, INC., an Illinois corporation,	) No. 90 C 5009
	) Judge Zagel
Plaintiff,	) Filed Under Seal
	) Pursuant to Court Order
v.	)
JOHN LABATT LIMITED, a Canadian corporation; et al.,	)
Defendants.	)

MINUTE ORDER DATED AUGUST 27, 1996

Motion for leave to file consumer class action complaint is denied. Motion in the alternative to disclose proposed complaint to and refer clients to Lawrence Walner is granted.

Mr. Messina moves for leave to file a consumer class action complaint in the Circuit Court of Cook County, Illinois. I am satisfied that Mr. Messina in his proposed complaint does not reveal information which has been deemed confidential. I am also satisfied that the public sources cited by Mr. Messina provide an independent basis for naming Mr. Marshall, Mr. Benton, and Flavor Fresh as defendants.

But I am not satisfied, based on past experience, that Mr. Messina should serve as class counsel. *See, e.g., Grove Fresh Distributors, Inc. v. John Labatt Ltd.*, 888 F. Supp. 1427, 1447-48 (N.D. Ill. 1995) ("Mr. Messina's willingness to hurt his perceived enemies . . . pales

beside his willingness to run roughshod over the best interests of his client. . . . Had he been class counsel, I would have afforded him no fees, because he was seemingly incapable of placing his client's interests above his own."). Therefore I deny Mr. Messina's motion for leave to file the complaint.

However, so that his clients and the class of orange-juice consumers he would otherwise represent are not prejudiced by this denial, I grant Mr. Messina's alternative motion to disclose the proposed complaint, and refer clients, to Mr. Lawrence Walner. I have no reason to believe that Mr. Walner, who is serving as counsel for orange-juice consumers in three related class-actions pending in Cook County, will subordinate his clients' interests to his own.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GROVE FRESH DISTRIBUTORS, INC., an Illinois corporation,	) No. 90 C 5009
	) Judge Zagel
Plaintiff,	) Filed Under Seal
	) Pursuant to Court Order
v.	)
JOHN LABATT LIMITED, a Canadian corporation; et al.,	)
Defendants.	)

MINUTE ORDER DATED FEBRUARY 6, 1997

Enter judgment order awarding attorneys fees and costs.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GROVE FRESH DISTRIBUTORS, INC., an Illinois corporation,	)	
Plaintiff,	)	No. 90 C 5009
v.	)	Honorable James B. Zagel
JOHN LABATT LIMITED, a Canadian corporation; et al.,	)	
Defendants.	)	

JUDGMENT

On June 9, 1995, this Court issued its Memorandum Opinion and Order Containing Findings of Fact and Conclusions of Law which found that the respondent, John P. Messina, had violated this Court's orders, and also that the respondent had violated Rule 11 of the Federal Rules of Civil Procedure. As part of that order, the respondent was directed to compensate the petitioners for losses resulting from his misconduct, including attorney's fees and costs that were incurred as a result thereof.

This matter now comes before the Court on the separate petitions of John Labatt Limited and American Citrus Products Corporation for payment of attorney's fees and costs. This Court has considered the petitions and supporting material submitted by John Labatt Limited and American Citrus Products Corporation, the various objections and arguments filed on behalf of the

Respondent, and the testimony received and the arguments heard in open court on January 21, 1997.

In conformance with the Court's ruling in open court on January 21, 1997, it is hereby ordered:

1. The respondent, John P. Messina, is found to have disobeyed this Court's orders and to have violated Rule 11 of the Federal Rules of Civil Procedure as stated in this Court's Memorandum Opinion and Order Containing Findings of Fact and Conclusions of Law dated June 9, 1995.

2. The respondent, John P. Messina, shall pay the petitioner, John Labatt Limited, $67,478.63 in respect of attorney's fees expended and $1,590.45 in costs incurred, for a total payment of $69,069.08.

3. The respondent, John P. Messina, shall pay the petitioner American Citrus Products Corporation, $77,929.88 in respect of attorney's fees expended and $2,555.49 in costs incurred, for a total payment of $80,485.37.

4. Interest shall accrue on the amounts to be paid from the date of entry of Judgment at the rate of 5.61% per annum pursuant to 28 U.S.C. § 1961.

February 6, 1997
Date

Enter

/s/ James B. Zagel

James B. Zagel,
United States District Judge

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604
Submitted November 19, 1997*
Decided February 5, 1998

Before
Hon. WILLIAM J. BAUER, *Circuit Judge*.
Hon. JOHN L. COFFEY, *Circuit Judge*.
Hon. KENNETH F. RIPPLE, *Circuit Judge*.

GROVE FRESH DISTRIBUTORS, INC., an Illinois corporation, *Plaintiff-Appellee*, Nos. 95-2603; 97-1471; 97-2867	)	
v.	)	Appeal from the
JOHN LABATT LIMITED, a Canadian corporation; JOHN LABATT, INC., a California corporation; LABATT FOOD COMPANY, a division of John Labatt Limited; EVERFRESH, a division of Labatt Food Company; EVERFRESH, INC., a Michigan corporation, and EVERFRESH, INC., a Canadian corporation, jointly d/b/a EVERFRESH JUICE CO.; AMERICAN CITRUS PRODUCTS CORPORATION, an Illinois corporation d/b/a HOME JUICE CO.; DANIEL	)	United States District Court for the Northern District of Illinois, Eastern Division. No. 90 C 5009 James B. Zagel, *Judge*

* This successive appeal has been submitted to the original panel under Operating Procedure 6(b). After examination of the briefs and the record, we have concluded that oral argument is unnecessary. Accordingly, the appeal is submitted on the briefs and the record. *See* Fed. R. App. Pro. 34(a); Cir. R. 34(f).

KOTWICKI; ALBERT "ACE" ALLEN; CHARLES JAMAIL; and HENRY LANG,
Defendant-Appellees.

Appeal of JOHN P. MESSINA

ORDER

Because this case is a successive appeal, we shall assume a familiarity with the facts set forth in our previous opinion, *See Grove Fresh Distributors, Inc. v. Everfresh Juice Company, et al.*, 24 F.3d 893 (7th Cir. 1994), and limit the discussion of facts to those necessary to the resolution of this appeal. John Messina represented Grove Fresh for a substantial period of time during the underlying unfair competition litigation. Grove Fresh filed two related complaints, the first in 1989 and the second in 1990. The 1989 case alleging unfair competition was insulated by a protective order, and the 1990 case alleging a conspiracy to sell adulterated juice and to violate RICO by selling mislabeled products was under a seal and protective order. In response to Mr. Messina's conduct during the course of the litigation, American Citrus Products Corp. and John Labatt Ltd., defendants, jointly petitioned the district court alleging that Mr. Messina violated the protective order and seal and requested a finding of contempt and imposition of sanctions against Mr. Messina. The district court found Mr. Messina in contempt of court for four separate acts of both civil and criminal contempt and in violation of Rule 11 and imposed sanctions. Subsequently, the district court vacated the portion of its judgment which imposed criminal sanctions. Messina now appeals the charges of civil contempt, the Rule 11 sanctions, and the other sanctions imposed.

Before addressing the pending appeal, a brief discussion of the first appeal follows. Two separate groups appealed to this Court. One group of consumers who had brought a separate, but related claim against the defendants requested that the protective order be modified so that duplicative discovery would be avoided in its related suit. The other group, the Ad Hoc Coalition of In-Depth Journalists ("Coalition"), was moving to intervene in the 1990 case and requested this Court to vacate the seal and protective orders on the basis that it had the right to have access to the sealed information. We modified the order so that the consumers would have access to particular material to avoid duplicative discovery in the collateral litigation. Additionally, we held that the district court should not have postponed the media's access to the case file once the media had demonstrated that its access had been unjustifiably limited by the protective order. We remanded the case to the district court and asked that the court provide an explanation for its conclusions and reasoning for ordering limited access to the case. *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 898 (7th Cir. 1994).

The district court had previously entered summary judgment against Grove Fresh in the 1989 unfair competition complaint while settlement negotiations in the 1990 case proceeded contemporaneously with the first appeal. On January 21, 1993, Grove Fresh relieved Mr. Messina of all responsibilities for its cases but did not withdraw the record of appearance for Messina until April 12, 1995. In February of 1993, the parties orally agreed to terms of a settlement but the defendants would not conclusively agree to settle until Mr. Messina also agreed to the settlement and confidentiality provisions of a consulting

agreement which were not filed with the court. Thereafter, upon agreed motions to dismiss, the district court dismissed the 1990 case on April 29, 1993. However, there were subsequent problems with the settlement agreement and dismissal of the case. On August 24, 1993, the Everfresh defendants filed a motion to enforce the settlement or for relief from judgment pursuant to Rule 60(b) as a result of Mr. Messina's conduct after the dismissal. When the parties appeared before Judge Zagel, Mr. Messina was not present and the district court ordered him to appear at the next court proceeding. The parties appeared before Judge Zagel at a later date, and Messina again was not present. As a result, the district court ordered the issuance of a rule to show cause.

On October 22, 1993, Mr. Messina filed a motion in this Court in which he sought a hearing on perceived allegations of misconduct. This motion revealed the confidential amount of the settlement and confidential information gained through discovery. In this motion, Messina also stated that he was the attorney for Grove Fresh which of course was inappropriate because he had been relieved of his duties in January of 1993. We ordered Messina's motion stricken and also ordered that he show cause as to why he should not be sanctioned for filling [sic] a frivolous motion. We then referred this matter to the Illinois Attorney Registration and Disciplinary Commission for further proceedings.

Thereafter, the defendants jointly petitioned the court for a finding of contempt and other sanctions against Mr. Messina for his actions throughout the litigation. On February 3, 1995, the district court held a hearing to afford Mr. Messina an opportunity to respond to the following charges: (1) that Mr. Messina is in contempt of

court for repeatedly violating the protective order and seal of the case by his disclosures of confidential discovery materials in a brief filed in the Seventh Circuit, in a letter to counsel for intervenors, and in a conversation with a reporter for the New York Times; (2) that Mr. Messina is in contempt of court for failing to appear before Judge Zagel when ordered to do so; and (3) that Mr. Messina is subject to Rule 11 sanctions for allegedly making false or misleading representations to this Court regarding his status as Grove Fresh's attorney.

The district court found Mr. Messina in contempt of court in four separate instances. For these four acts of civil contempt, he was ordered to compensate the parties for losses incurred, including attorney's fees and costs. For these four acts of criminal contempt, the district court ordered Mr. Messina to pay $1000 to the United States for each of the four instances. Additionally, in light of Mr. Messina's past disregard for court orders, the district court was concerned with future noncompliance and ordered him to post a $50,000 bond for the next five years, emphasizing that any future disclosure without consulting the court first would result in forfeiture of the money. Mr. Messina now appeals the findings of civil contempt, the Rule 11 violation, and the sanctions imposed.[1]

As threshold matter, we requested briefing on whether we have jurisdiction to review the seal and protective orders. Mr. Messina asserts that the district

[1] As previously noted, the district court vacated the criminal contempt, and consequently, we will not address the issue of criminal contempt.

court's finding of contempt is not proper because he argues that the seal and protective orders are not valid. Judge Zagel entered a protective order and sealed the case before him so as to prevent disclosure of any confidential material and adverse publicity. Judge Zagel observed Mr. Messina's behavior firsthand and warned him about his inappropriate conduct and attempts to circumvent the protective orders. In his Memorandum Opinion and Order, Judge Zagel thoroughly addressed Mr. Messina's attack against the orders of confidentiality. Judge Zagel discussed the proper scope, constitutionality, and validity of the orders.

On appeal, Messina suggests that the district court erred in its interpretation of the orders and argues that they lack legal and factual bases. However, we find nothing inappropriate with the court's judgment. As we previously stated, Judge Zagel's initial failure to articulate his reasoning for ordering the seal and protective order does not automatically translate into a reversal. *Grove Fresh*, 24 F. 3d at 898-99. On remand, we requested that the district court set forth its reasoning, and Judge Zagel has provided ample explanation for his initial decision to enter a protective order and to seal the case. We find absolutely no reason to substitute our judgment for that of the district court, and we are certainly in no position to question Judge Zagel's first hand impressions of Mr. Messina's conduct and the court's motivation for entering the protective order and seal. The district court has sufficiently explained its reasons for entering the seal and protective order. Review of the seal and protective orders is properly within our jurisdiction. As such, we too conclude that the seal and protective orders were valid and

constitutional and that Mr. Messina's attempts to attack the validity and constitutionality of the orders must fail.

We now turn to Mr. Messina's four acts of civil contempt and his Rule 11 violation. Mr. Messina argues that the district court improperly applied the seal and protective orders as a gag which violated due process and his First Amendment rights. The district court has broad discretion to grant the relief it deems necessary and appropriate. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 193 (1949). A determination of contempt requires an order of "reasonable specificity which has been violated." *Matter of Betts*, 927 F.2d 983, 986 (7th Cir. 1991). There are three alleged violations of the orders of confidentiality: (1) disclosures in a brief submitted to this Court; (2) disclosures in a letter to counsel for the Coalition; and (3) disclosures in a conversation with a news reporter. The district court held that these three separate instances each violated the protective orders. It is clear from the record Mr. Messina's repeated actions of disclosure were attempts to leak information to the public. We also conclude that these disclosures violated the orders of confidentiality. Accordingly, we affirm the district court's judgment finding Messina in contempt of court for these violations.

The fourth instance of contempt of court stems from Mr. Messina's failure to appear in court as ordered by Judge Zagel. Mr. Messina argues that he did not disobey any court order requiring his appearance because there was no written order issued which required him to appear. The fact that the district court did not issue a written order is inconsequential. Although the district court may not have issued a written order requiring Messina to appear, the district court clearly explained that Mr. Messina was to be present at the next court proceeding. In

fact, Mr. Messina admitted that he had received notice and had knowledge that Judge Zagel had ordered him to appear. Judge Zagel concluded:

> After watching him testify, and after reviewing the record, I am convinced beyond any doubt that Mr. Messina had proper notice, fully understood his appearance was required, and knew the reasonable consequences of his actions. I find not only that Mr. Messina's choice not to appear was willful but that it was made in bad faith.

Grove Fresh Distributors, Inc. v John Labatt Ltd., No. 90 C 5009 at 49-50 (N.D. Ill. June 13, 1995). Judge Zagel's findings of fact are entitled to great deference, and we find no reason to disrupt his conclusion. Accordingly, we affirm the district court's finding of contempt for Mr. Messina's failure to appear as ordered by the district court.

The fifth charge against Mr. Messina stems from the motion he filed with this Court on October 22, 1993 and the misrepresentation of his status as Grove Fresh's attorney. On November 9, 1993, we denied Messina's motion and asked that he show cause, pursuant to Federal Rule of Appellate Procedure 46(c), as to why he should not be sanctioned for filing a frivolous motion. American Citrus then filed a motion in our Court requesting disciplinary action against Messina for his misrepresentations. In an order dated December 14, 1993, we denied American Citrus's motion, holding that "[t]he relief requested is appropriately sought in the district court." The district court then addressed this issue of a Rule 11 violation, among other things, in its judgment. Judge Zagel made three specific findings of fact each of which are independently sanctionable as violations of Rule 11: (1) Messina's claim of attorney status was not well grounded in fact; (2)

Messina certified the matter was filed with a proper purpose when it was not; and (3) the filing of his brief was not warranted by existing law. We agree with Judge Zagel's disposition of this matter and the sanctions imposed for Mr. Messina's violation of Rule 11.

The final sanction against Mr. Messina involves the district court's judgment that he post a $50,000 bond for the next five years to prevent any future disclosures. The district court possesses substantial discretion to enter an order that is appropriate under the circumstances, and the violation of a prior order justifies a broader remedial order. *Madsen v. Women's Health Center*, 512 U.S. 753, 770 (1994); *Scandia Down v. Euroquilt Inc.*, 772 F.2d 1423, 1432 (7th Cir. 1985). Judge Zagel ordered Messina to consult with him first and to provide an independent source for the information before he proceeded to publicly disclose any information pertaining to the suit. If Messina fails to consult Judge Zagel, then forfeiture of the bond is automatic. In reviewing the record and Judge Zagel's findings of fact, we find that there is nothing inappropriate in the district court ordering Messina to post bond. It is clear from the record that Mr. Messina has not hesitated to disregard the district court in the past, and this bond may provide greater incentive for Mr. Messina to adhere to the district court's requests in the future.

Next, Mr. Messina argues that the sanctions imposed are improper. After finding Mr. Messina was in contempt of court and had violated Rule 11, the district court held an evidentiary hearing to determine defendants' losses, attorneys' fees, and costs. The district court awarded the defendants $149,554.45 for attorneys' fees and costs expended in prosecuting the contempt charges. There is no indication that the district court abused its discretion in

awarding attorneys' fees and costs and no reason to conclude that the monetary award was excessive. Accordingly, we affirm the district court's award of $149,554.45.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

August 29, 2001

Before

Hon. DANIEL A. MANION, *Circuit Judge*

GROVE FRESH DISTRIBUTORS, INCORPORATED, an Illinois corporation, Plaintiff-Appellee,	] Appeals from the United] States District Court for] the Northern District of] Illinois, Eastern Division.] No. 90 C 5009
Nos. 01-2799 and 01-3024 v.	] James B. Zagel, Judge.
JOHN P. MESSINA, Defendant-Appellant.	]

The following is before the court: **RESPONDENTS' REQUEST FOR AN ORDER MAINTAINING CERTAIN DOCUMENTS UNDER SEAL**, filed on August 24, 2001, by attorney Steven Kowal.

This court will not seal a record simply because the parties have signed a confidentiality agreement. *See Union Oil Co. of California v. Leavell*, 220 F.3d 562, 567-68 (7th Cir. 2000). Accordingly,

IT IS ORDERED that the motion is **DENIED** without prejudice. The 73 documents will remain under seal for 10 days. Absent a motion from a party stating an appropriate reason to maintain those documents under seal, the documents will be placed in the public record on September 7, 2001.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

September 7, 2001

Before

Hon. MICHAEL S. KANNE, *Circuit Judge*

GROVE FRESH DISTRIBUTORS, INCORPORATED, an Illinois corporation, Plaintiff-Appellee,	] Appeals from the United] States District Court for] the Northern District of] Illinois, Eastern Division.] No. 90 C 5009
Nos. 01-2799 and 01-3024 v.	] James B. Zagel, Judge.
JOHN P. MESSINA, Defendant-Appellant.	]

Upon consideration of the **RESPONDENTS' REQUEST FOR AN ORDER MAINTAINING CERTAIN DOCUMENTS UNDER SEAL**, filed on August 24, 2001, by attorney Steven M. Kowal for Notice-Only American Citrus Products Corporation,

IT IS ORDERED that the request is **DENIED**. The clerk shall unseal the 73 envelopes received from the district court.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

September 30, 2002

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*

Hon. JOHN L. COFFEY, *Circuit Judge*

Hon. KENNETH F. RIPPLE, *Circuit Judge*

Nos. 01-2799, 01-3024

GROVE FRESH DISTRIBUTORS, INC,
Plaintiff

v..

JOHN LABATT LIMITED, et al.,
Defendants-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 90 C 5009

James B. Zagel, *Judge.*

ORDER

On consideration of the petition for rehearing and petition for rehearing *en banc* filed in the above-captioned case by John P. Messina, no judge in active service has requested a vote thereon* and all of the judges on the original panel have voted to deny.

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* Neither The Honorable Joel M. Flaum nor The Honorable Ilana Diamond Rovner took part in the consideration of this petition.

Therefore, the petition for rehearing is hereby DENIED.

U.S. Constitution, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Constitution, Article. III, Section 1.

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Title 18, Section 2071. Concealment, removal, or mutilation generally

(a) Whoever willfully and unlawfully conceals, removes, mutilates, obliterates, or destroys, or attempts to do so, or, with intent to do so takes and carries away any record, proceeding, map, book, paper, document, or other thing, filed or deposited with any clerk or officer of any court of the United States, or in any public office, or with any judicial or public officer of the United States, shall be fined under this title or imprisoned not more than three years, or both.

(b) Whoever, having the custody of any such record, proceeding, map, book, document, paper, or other thing, willfully and unlawfully conceals, removes, mutilates, obliterates, falsifies, or destroys the same, shall be fined under this title or imprisoned not more than three years, or both; and shall forfeit his office and be disqualified from holding any office under the United States. As used in this subsection, the term "office" does not include the office held by any person as a retired officer of the Armed Forces of the United States.

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28 U.S.C. § 455. Disqualification of justice, judge, or magistrate judge

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser

or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

* * *

(e) No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

* * *

Federal Rules of Civil Procedure

Rule 60. Relief from Judgment or Order

* * *

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made

within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., Sec. 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Rule 79. Books and Records Kept by the Clerk and Entries Therein

(a) Civil Docket. The clerk shall keep a book known as "***civil*** docket" of such form and style as may be prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States, and shall enter therein each ***civil*** action to which these rules are made applicable. Actions shall be assigned consecutive file numbers. The file number of each action shall be noted on the folio of the docket whereon the first entry of the action is made. All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be entered chronologically in the ***civil*** docket on the folio assigned to the action and shall be marked with its file number. These entries shall be brief but shall show the

nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The entry of an order or judgment shall show the date the entry is made. When in an action trial by jury has been properly demanded or ordered the clerk shall enter the word "jury" on the folio assigned to that action.

(b) **Civil Judgments and Orders.** The clerk shall keep, in such form and manner as the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States may prescribe, a correct copy of every final judgment or appealable order, or order affecting title to or lien upon real or personal property, and any other order which the court may direct to be kept.

(c) **Indices; Calendars**. Suitable indices of the civil docket and of every civil judgment and order referred to in subdivision (b) of this rule shall be kept by the clerk under the direction of the court. There shall be prepared under the direction of the court calendars of all actions ready for trial, which shall distinguish "jury actions" from "court actions."

(d) **Other Books and Records of the Clerk.** The clerk shall also keep such other books and records as may be required from time to time by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States.

Seventh Circuit Operating Procedures

10. Sealing Portions of the Record: *(a) Requirement of Judicial Approval.* Except to the extent portions of the record are required to be sealed by statute (e.g., 18 U.S.C. §3509(d)) or a rule of procedure (e.g., Fed. R. Crim. P. 6(e),), every document filed in or by this court (whether or not the document was sealed in the district court) is in the public record unless a judge of this court orders it to be sealed.

(b) Delay in Disclosure. Documents sealed in the district court will be maintained under seal in this court for 14 days, to afford time to request the approval required by section (a) of this procedure.

Code of Judicial Conduct

Canon 1: A judge should uphold the integrity and independence of the judiciary.

Canon 2A: A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GROVE FRESH DISTRIBUTORS, INC., an Illinois corporation,	) No. 90 C 5009
	) Judge Zagel
Plaintiff,	) Filed Under Seal
	) Pursuant to Court Order
vs.	)
JOHN LABATT LIMITED, a Canadian corporation; et al.,	)

EVERFRESH'S MOTION TO ENFORCE SETTLEMENT OR RELIEF FROM JUDGMENT

Everfresh Inc., by its attorneys, moves this Court for an order either enforcing the Settlement Agreement in this cause or granting it relief from judgment, pursuant to FRCP Rule 60(b). In support of its motion, Everfresh states as follows:

1. On April 22, 1993, this cause was dismissed with prejudice pursuant to settlement between the parties.

2. On August 5, 1993, one of Grove Fresh's attorneys, John P. Messina, sent correspondence to counsel for defendants and the defendants themselves indicating that he was repudiating non-disclosure and confidentiality terms contained in the Settlement Agreement.[1] Moreover,

[1] A copy of this correspondence, as well as further correspondence received from Messina on August 19, 1993, is being submitted to the Court's chambers for *in camera* inspection.

Mr. Messina's correspondence indicates that, even at the time of settlement, he apparently did not intend to abide by the terms of the Settlement Agreement.

3. At the time of settlement, Mr. Messina also entered into a Consulting and Legal Representation Agreement with certain defendants, including Everfresh, Inc. At the time he executed this Agreement, Messina specifically warranted in the Agreement itself that he had reviewed the applicable ethical rules in Illinois and that the Agreement complied with those rules. Mr. Messina states in his August 5, 1993 correspondence that the initial payment made pursuant to the Agreement was immediately placed into an escrow account, indicating that Mr. Messina questioned his obligations under the Agreement even at the time he was confirming that he understood and intended to honor those obligations.

4. The Settlement Agreement and the Consulting and Legal Representation Agreements should be enforced as executed. As this Court is well aware, this litigation, filed more than five years ago, has been protracted and expensive. It is for that reason that the defendants insisted that the settlement be structured to ensure total peace. A high price was paid and the defendants are entitled to the peace for which they bargained. In the alternative, pursuant to Rule 60(b), Everfresh, Inc. is entitled to relief from judgment, which would require the return of all settlement proceeds, plus interests thereon since the date of payment.

WHEREFORE, Everfresh, Inc. requests that this Court enter an Order either enforcing the Settlement Agreement and Consulting and Legal Representation Agreement or granting Everfresh Inc. relief from the

judgment of dismissal pursuant to settlement in this case, including the return of the settlement proceeds with interest.

Respectfully submitted,

EVERFRESH INC.

By: /s/ Lazar Raynal
One of Its Attorneys

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